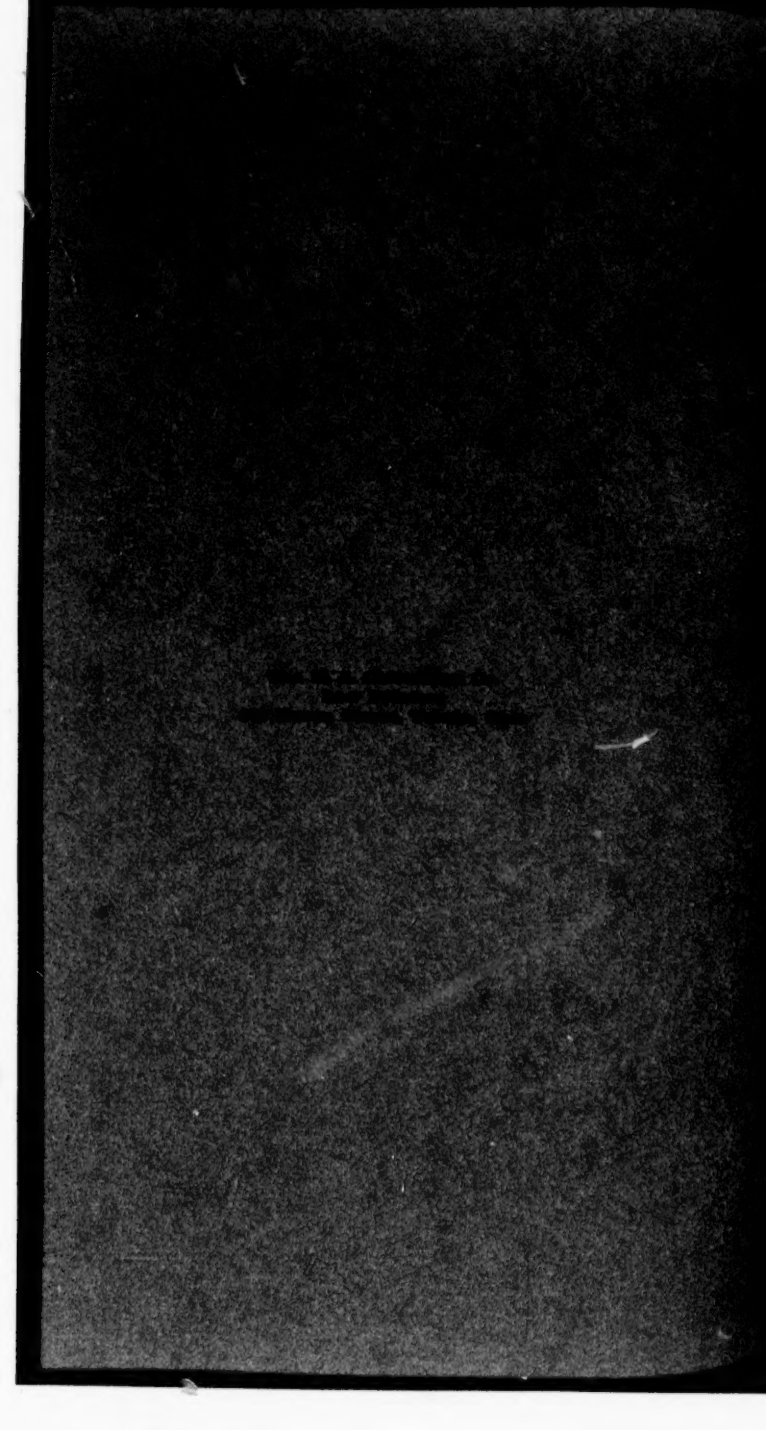

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 784

C. M. Burns,
Appellant,

vs.

David M. Kahrens, as Sheriff of Lucas County, Ohio,
Appellee.

No. 785

John W. Kohlhepp,
Appellant,

vs.

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Appeals from the Supreme Court of the State of Ohio.

BRIEF IN BEHALF OF APPELLEE

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Cleveland, Ohio,

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APPEALS FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF IN BEHALF OF APPELLEE.

STATEMENT OF THE CASES.

The appellant Bevan appeals from a final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully committed as for contempt for his refusal to produce documents or to testify in obedience to the command of a subpoena personally served upon him.

The appellants Koehrman and Stranahan, respectively, appeal from final judgments of the Supreme Court of Ohio, which held that they were respectively lawfully attached to institute proceedings to determine whether their deliberate disregard of subpoenas personally served upon them constitutes contempt. While the technical legal forms in which these cases come before this Court involve on their faces merely the validity of such commitment and attachments, the practical question underlying these technical forms is whether these appellants, all of whom are citizens of Ohio, may be compelled to give their testimony by deposition in accordance with the statutes of that State to aid in the administration of civil justice. The practical question is not whether these appellants shall be imprisoned, but whether these appellants may avoid giving their testimony in a civil case pending in the State of Ohio.

While it seems immaterial, unless it be for one purpose hereinafter mentioned, none of the proceedings here under review is an action in *habeas corpus* under the Ohio statutes, the Ohio Constitution, or the common law, but they are severally applications for release from alleged unlawful imprisonment, pursuant to the statutory remedy conferred and created by Section 11514, Ohio General Code.

The material facts may be briefly stated. On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Herman Sielcken, filed her petition in the Common Pleas Court of Lucas County, Ohio, against The Woolson Spice Company, an Ohio corporation (of which appellant Bevan is Secretary and Treasurer), the appellants Koehrman and Stranahan and others. The petition charges that the defendants fraudulently conspired together to take advantage of the absence of Sielcken (President and controlling stockholder of the Woolson Company) in Germany, where he had gone on the business of the Company, and where he had been detained by his last ill-

ness and the exigencies of the World War, to oust Sielcken as President and wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter the defendants conspired together to acquire the stock formerly held by Sielcken and then held by his Estate for a grossly inadequate price; that the fraudulent conspiracy was carried on by the individual defendants, taking advantage of the control of the corporation wrongfully acquired by them and taking advantage of their position of trust and confidence, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the Executor and to all prospective purchasers of the stock and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by The Woolson Spice Company, obtained the stock of the Sielcken Estate for a grossly inadequate price. The conspiracy was carried on and consummated, while the plaintiff, widow of Sielcken, was still interned in Germany as an alien enemy. The petition asks to have the stock so obtained restored to the Estate, together with all dividends paid thereon since its fraudulent conversion. It is impossible to set forth the scope and ramifications of the fraudulent conspiracy and the fraudulent acts of the defendants in a brief compass and this can only be appreciated by an examination of the petition. (Bevan, 70-88; Koehrman, 48-66; Stranahan, 46-64.)*

The appellant Bevan was personally served with a subpoena *duces tecum* to appear before a notary public and give his testimony by deposition in the foregoing suit. (Bevan, 44-46.) Bevan appeared in response to his subpoena and was sworn but, *while making no claim of privi-*

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* Note: The three records are referred to by the respective names of the appellants.

lege and while admitting that he knew what books and records were wanted and that they were under his control, refused to produce any of the books or records described in his subpoena, though found by the examining magistrate to be material, and refused first to answer material questions, and then to answer any further questions of any character whatsoever, on his oral examination. Thereupon the notary adjudged that said questions were material, that said books and records were material and properly described and issued to the Sheriff of Lucas County a commitment directing him to arrest and commit the said witness to the County jail until he should submit to testify. (Bevan, 46-67.)

The appellant Koehrman was personally served with a subpoena *duces tecum* to appear before a notary public and give his testimony by deposition in the foregoing suit. (Koehrman, 43-44.) The appellant Stranahan was personally served with a simple subpoena to appear before a notary public and give his testimony in said suit. (Stranahan, 43.) Both Koehrman and Stranahan wholly disregarded their respective subpoenas and failed and refused to appear either at the time fixed by their subpoenas or at an adjournment of the taking of the depositions. Thereupon the notary issued writs of attachment for each of them commanding the Sheriff of Lucas County, Ohio, to attach and bring each of them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpoena as to give testimony in the action." (Koehrman, 45; Stranahan, 42.)

In issuing the commitment for the appellant Bevan and attachments for the appellants Koehrman and Stranahan, the notary public acted under the authority conferred upon him by Sections 11510, 11511, 11512 and 11529, Ohio General Code, printed at pp. 13-15 and in Appendix A hereof.

In reviewing the action of the notary public, the Ohio Courts acted under Section 11514, General Code of Ohio.

Thereafter each of the appellants by arrangement surrendered to the Sheriff of Lucas County in the Lucas County Court House and immediately filed their several applications under Section 11514, General Code of Ohio, for discharge from alleged illegal imprisonment. (Bevan, 37, 89; Koehrman, 36, 67; Stranahan, 36, 65.) The Court of Appeals of Lucas County, Ohio, forthwith admitted each of said appellants to bail upon their respective applications. (Bevan, 37; Koehrman, 36; Stranahan, 36.) The appellants Koehrman and Stranahan, by this untimely resort to the Court, thus prevented the Sheriff from bringing them before the notary public for hearing as to whether their disobedience of their respective subpoenas constituted contempt. The absence of this hearing so prevented by the appellants Stranahan and Koehrman is one of the grounds advanced for their release. It is from the foregoing commitment that the appellant Bevan and from the foregoing attachments that the appellants Koehrman and Stranahan seek release on these appeals.

After a full hearing, the Court of Appeals of Lucas County denied the respective applications of the appellants for release from alleged illegal imprisonment and remanded each of the appellants to the custody of the Sheriff. (Bevan, 39, 133-136; Koehrman, 38, 110-114; Stranahan, 38, 108-111.) Thereupon the appellants prosecuted separate proceedings in error to the Supreme Court of Ohio which heard the cases together and affirmed the lower court in each case.

During the interim between the judgments of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellants attempted the collateral remedy of *habeas corpus* in the Federal Courts. Those collateral proceedings, which were disposed of by this Court

on December 12, 1932, by denial of the appellants' respective petitions for certiorari, are of course immaterial so far as these present appeals are concerned.

The Statutory Scheme of Ohio Under Which it Was Sought to Take the Testimony of the Appellants and to Enforce Their Obedience to State Process.

A brief analysis not only of the precise Sections of the Ohio Code here attacked, but of the auxiliary Sections of the Ohio Code embraced in the statutory scheme for taking testimony by deposition in civil cases in Ohio, will, we believe, serve to clarify the contentions urged upon this Court. All of the Sections of the Ohio Code hereinafter referred to are printed in full in Appendix A hereof.

Section 11521* provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of deposition be given to the adverse party. Section 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notaries public and judges. Sections 11502, 11503 and 11504 provide for the issuance form and service of subpoenas and subpoenas *duces tecum*. This, in brief, and

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* All statutes here referred to are Sections of the Ohio General Code.

and so far as deemed material, is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these Sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpoena; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The Section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpoena is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally served*, the examining magistrate *may* issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the Judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*." Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *Decamp*

v. Archibald, 50 O. S. 618 at 626 (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein v. Schott*, 92 O. S. 29 at 41; and the decision below, *Ex Parte Bevan*, 126 O. S. 126, 184 N. E. 393, paragraph 3 of the syllabus. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165.) On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the appellants.

QUESTIONS INVOLVED.

Although the appellants have filed a joint brief in this Court and severally seek the reversal of the respective judgments of the Ohio Supreme Court on the ground that Sections 11510, 11511 and 11512 are void as repugnant to the Fourteenth Amendment and that they have thereby been severally committed or attached without due process of law, an examination of their "Specification of the Assigned Errors Which are Intended to be Urged" (Appellants' Brief 6-11) discloses that the appellant, Stranahan, has in fact abandoned his appeal and the appellant, Koehrman, has limited his appeal to a single point, for the first four of the five assignments relied upon deal exclusively with the commitment of the appellant, Bevan, and the fifth assignment deals only with appellants, Bevan and Koehrman. Moreover, this appears to be conceded, for the appellants' arguments are addressed solely to the proceedings had be-

for the notary and the resulting writ of commitment for the appellant, Bevan, with the addition of a short argument concerning the subpoena *duces tecum* served on Koehrman.

The first three assignments (Appellants' Brief 6-9) challenge the above statutes on the ground that they confer an arbitrary power upon a notary to commit for contempts occurring in his presence and that they do not afford notice and an opportunity to be heard prior to the notary's adjudication of contempt and order of commitment. Clearly these assignments relate only to the case of Bevan who alone was adjudged to be in contempt by the notary and ordered to be committed. The fourth assignment (Appellants' Brief 10) relates to the alleged factual disqualification of the notary on account of an alleged pecuniary interest arising out of the fact that in the Bevan case the notary also acted as stenographer and was thereby entitled to compensation based on the amount of testimony taken. Necessarily this assignment is irrelevant as far as Koehrman and Stranahan are concerned, as it is based upon an alleged factual disqualification which did not then and may never apply to the proceedings had and to be had in the Koehrman and Stranahan matters. Obviously, it does not follow that because the notary acted as stenographer in the Bevan case, he will also act as stenographer when Koehrman and Stranahan give their testimony. The fifth assignment (Appellants' Brief 11) attacks the subpoenas *duces tecum* served upon Bevan and Koehrman on the ground that they constitute unreasonable searches and seizures. The result is that none of the assignments specified are relevant to the case of the appellant, Stranahan, and that so far as he is concerned the judgment below stands confessed and that the appellant, Koehrman, bases his appeal from the judgment of the Ohio Supreme Court solely upon the fifth assignment specified.

However, the joint contentions of the appellants may be summarized as follows:

First, Sections 11510, 11511, 11512 and 11514, Ohio General Code, are unconstitutional as denying due process of law under the Federal Constitution because,—

(a) They fail to provide for notice and opportunity to be heard according to their terms; and

(b) A Notary Public in any event is without jurisdiction to exercise the power to hear and determine conferred by these statutes under the decisions of the Supreme Court of Ohio and under the Fourteenth Amendment of the Federal Constitution; and

(c) The right to a judicial review afforded by section 11514 does not aid the allegedly invalid procedure provided by sections 11510, 11511 and 11512.

Second, The procedure actually followed constituted a denial of due process of law because,—

(a) There was in fact in the case of Bevan, no notice and opportunity to be heard; and

(b) The Notary Public was constitutionally disqualified by interest to act.

Third, In the cases of Koehrman and Bevan, the subpoenas *duces tecum*, as unreasonable searches and seizures, contravened the due process clause of the Fourteenth Amendment of the Federal Constitution.

Some of these contentions are not open to any of the appellants on these appeals. None of them is meritorious.

ARGUMENT.

I.

THE JURISDICTION OF THIS COURT ON THESE APPEALS IS LIMITED TO A SCRUTINY OF THE CONSTITUTIONALITY OF OHIO GENERAL CODE SECTIONS 11510, 11511, 11512 AND 11514.

In addition to the questions relating to the constitutionality of certain sections of the Ohio General Code the appellants make three contentions, going solely to the actual proceedings had under the statutes which are attacked, and to certain procedure based upon and authorized by other sections of the Ohio General Code of which the constitutionality is not questioned. These three contentions are as follows:

(a) That the appellant, Bevan, was in fact deprived by the notary of notice and an opportunity to be heard.

(b) That the notary authorized by Section 11529 to preside at the taking of depositions, and by Section 11537 to transcribe the testimony, and by Sections 127 and 1746-2 to receive compensation therefor, was by these facts disqualified on account of pecuniary interest.

(c) That the subpoenas *duces tecum* served upon the appellants Bevan and Koehrman, were in fact so broad as to constitute an unreasonable search and seizure.

While none of these contentions is tenable, they are not open to the appellants on these appeals. Sections 11529, 11537, 127 and 1746-2 were not questioned by the appellants during any stage of these proceedings in the Ohio courts and they have not been included in their "Specification of the Assigned Errors which are Intended to be Urged." (Appellants' Brief 6-11.) It is clearly too late to attack these statutes now (*Hulbert v. Chicago*, 202 U. S. 275, 280) and since the claim of the disqualification of the notary arises directly out of these unchallenged statutes the appel-

lants are not entitled to urge the second of the foregoing contentions.

Moreover, since each of the three claims mentioned above relate to the deprivation of constitutional privileges and immunities, rather than to a direct attack on the statutes specified by the appellants, these claims are not of the character which will be entertained by this Court on appeal. *Judicial Code*, Sec. 237, 28 *U. S. C. A.* 344; *Zucht v. King*, 260 U. S. 174. Thus in the latter case it was stated by Mr. Justice Brandeis at page 177:

> "The bill contains also averments to the effect that in administering the ordinance the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal v. Delaware*, 103 U. S. 370. But the question is not of that character which entitles a litigant to a review by this Court on writ of error. The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials. Compare *Taylor v. Taft*, 203 U. S. 461; *Champion Lumber Co. v. Fisher*, 227 U. S. 445; *Yazoo & Mississippi Valley R. R. Co. v. Clarksdale*, 257 U. S. 10, 16. This charge is of an unconstitutional exercise of authority under an ordinance which is valid. Compare *Stadelman v. Miner*, 246 U. S. 544. Unless a case is otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari.
>
> "*Writ of error dismissed.*"

It is therefore submitted that the appellants should be precluded from asserting any claims other than their contentions that Sections 11510, 11511, 11512 and 11514 are, according to their terms, repugnant to the Fourteenth Amendment.

II.

SECTIONS 11510, 11511, 11512 AND 11514, OHIO GENERAL CODE, AFFORD NOTICE AND OPPORTUNITY TO BE HEARD WITH A FULL, FREE AND UNTRAMMELED REVIEW AND SATISFY EVERY REQUIREMENT OF DUE PROCESS OF LAW; AND THE POWERS BY SUCH STATUTES CONFERRED UPON AN OFFICER BEFORE WHOM DEPOSITIONS MAY BE TAKEN PURSUANT TO SECTION 11529, OHIO GENERAL CODE, MAY BE CONSTITUTIONALLY EXERCISED BY A NOTARY.

It is not entirely clear whether the appellants contend that the statutes under which Bevan was committed and Kochrman and Stranahan were attached are unconstitutional for lack of any provision for notice and opportunity to be heard regardless of the character of the magistrate before whom the depositions are to be taken and by whom the power of commitment or attachment under such statutes is exercised, or whether appellants concede the constitutionality of such statutes and the adequacy of their provision for notice and opportunity to be heard but contest the constitutionality of any commitment or attachment by a notary public, pursuant to such statutes, not because of any inadequacy of the procedure, notice and hearing provided by such statutes but because, as claimed by the appellants, a notary public in Ohio has not the jurisdiction or authority to exercise the power conferred by such statutes upon the officer before whom a deposition is taken. Section 11529, which designates the various officers before whom depositions may be taken and who may therefore exercise the powers of commitment and attachment under the statutes attacked, reads:

> "*Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, *notary*

public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission."

Clearly it will facilitate an orderly and accurate examination of the soundness of the contention of appellants to determine first, whether the statutes attacked are unconstitutional according to their terms for lack of provision for notice and opportunity to be heard, and second, if the first inquiry be answered in the negative, whether they are unconstitutional as applied to notaries because notaries are without jurisdiction to afford the notice and opportunity to be heard provided by such statutes.

A.

It Is Clear that Sections 11510, 11511 and 11512, Ohio General Code, Are Not Unconstitutional According to their Terms for Lack of Provision for Notice and Opportunity to be Heard.

The pertinent Sections of the General Code of Ohio read:

"Section 11510. *Disobedience of a subpoena*, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a *witness* or to subscribe a deposition, may be punished *as a contempt* of the court or officer by whom the attendance or testimony of the witness is required."

"Section 11511. When a witness fails to obey a subpoena *personally served*, the court or officer, before whom his attendance is required, *may* issue to the sheriff, coroner, or a constable of the county, *an attachment*, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony, and *answer for the contempt*. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his ap-

pearance, which sum shall be endorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness *was not personally served,* the court, *by a rule,* may order him to show cause why an attachment should not issue against him."

"Section 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." (Italics ours.)

Section 11510 provides that (1) Disobedience of a subpoena, (2) Refusal to be sworn, and (3) Unlawful refusal to answer as a witness may be punished as a contempt. It is obvious that a contempt for refusal to be sworn or for unlawful refusal to answer as a witness must be committed in the presence of the officer before whom the deposition is taken. It is elementary law that where a contempt is committed in the presence of the court or magistrate empowered to punish therefor, no further citation or hearing is necessary. *Ex parte Terry,* 128 U. S. 289, 306; *McGrain v. Daugherty,* 273 U. S. 135, 157; *Blankenburg v. Commonwealth of Massachusetts,* 272 Mass. 25, 172 N. E. 209; *Middlebrook v. State,* 43 Conn. 257; *In re Willis,* 94 Wash. 180, 162 Pac. 38.

In *McGrain v. Daugherty,* 273 U. S. 135, Mr. Justice Van Devanter at page 157 stated the rule as follows:

"This is illustrated by the settled rulings that courts in dealing with contempts committed in their presence may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowl-

edge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served."

In *Blankenburg v. Commonwealth of Massachusetts*, 272 Mass. 25, 172 N. E. 209, 73 A. L. R. 808 at page 814 (A. L. R. citation), Chief Justice Rugg said:

"The plaintiff in error further contends that her arrest was illegal since no warrant or other process issued or was served upon her. The contempt here in issue and already described was direct. It was committed in the very presence of the court. In these circumstances no warrant was necessary. The arrest rightly might be made upon the oral direction of the presiding judge. It was said by Knowlton, *C.J.*, in *Hurley v. Commonwealth*, 188 Mass. 443, at page 446, 74 N. E. 677, 679, 3 Ann. Cas. 757: 'If a contempt is committed in the presence of the judge, no complaint or process is necessary to give the court jurisdiction of the offender, but the court may act upon its judicial knowledge, and the contemnor may be taken into custody at once.' *This method of procedure is not denial of due process of law but in strict accordance with every principle of due process of law. In re Terry*, 128 U. S. 289, 313, 9 S. Ct. 77, 32 L. Ed. 405; *McGrain vs. Daugherty*, 273 U. S. 135, 157, 158, 47 S. Ct. 319, 71 L. Ed. 580, 50 A. L. R. 1; *Middlebrook v. State*, 43 Conn. 257, 268, 269, 21 Am. Rep. 650; *In re Willis*, 94 Wash. 180, 162 P. 38." (Italics ours.)

Nor can any relevant distinction be drawn between the power of a judge to punish for a contempt committed in his presence without further notice or opportunity to be heard, which power may be either inherent or statutory, and the coinciding power of a notary public or other administrative officer, which is concededly statutory and not inherent. It must be obvious that the question of whether a court or magistrate has the power to commit for contempt, either inherent or by statute, is quite a different

question from whether the manner of exercising the power satisfies the requirements of due process of law. It is true that a court independently of statute ordinarily has the inherent power to commit for contempt. But that does not mean that a court can validly deny due process of law in the exercise of that power. It is obvious that it can not. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard constitutes due process of law, it is immaterial whether the authority of the committing power so to punish for contempt rests upon a valid statute or is inherent. Appellants, therefore, cannot distinguish, as they sought to do below, any of the cases cited on the ground that courts have inherent power to punish for contempt and hence the elements of due process are not involved. The cases hereinbefore cited conclusively establish that if a court or magistrate has power to commit for contempt, it is due process to commit one who has perpetrated a contempt in the face of the committing authority without further notice or opportunity to be heard. It is, therefore, clear that insofar as this statute authorizes a court or officer before whom depositions are being taken to commit a witness for refusal to be sworn or refusal to testify which, if unlawful, must constitute contempts committed in the face of the magistrate, without further notice or opportunity to be heard, it is "in strict accordance with every principle of due process of law." *Blankenburg v. Commonwealth of Massachusetts, supra.*

On the other hand, it is equally clear that disobedience of a subpoena (the other species of contempt described in Section 11510) is not committed in the presence of the court or magistrate. We therefore find that Section 11511 provides that on failure of a witness to obey a subpoena *personally served*, the court or magistrate *may* issue an

attachment commanding the officer to bring the recalcitrant witness before him to *answer for the contempt.* This is in strict accordance with every requirement of due process of law.

Where the contempt is not committed in the presence of the court or magistrate, it is well settled that the proceedings to punish for contempt may be initiated either by rule or order to show cause or by attachment. *In re Steiner,* 195 Fed. 299, 302. Issuance of such an attachment and arrest thereunder is not as a punishment for contempt but for the purpose of initiating the proceedings and bringing the person before the court or magistrate to answer for the alleged contempt. This provides for notice and hearing. Where the evidence of the contempt is before the court, such as where the return shows the personal service of a subpoena upon an intended witness, an attachment may lawfully issue without affidavit but on the court's own knowledge of the default; and such a procedure constitutes due process of law. As stated by Mr. Justice Van Devanter in *McGrain v. Daugherty, supra,* at page 157:

> "* * * they (court or committing authority) may issue attachments, based on their own knowledge of the default where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served."

Personal service of a subpoena is the appropriate and customary form of notifying a citizen that he is required to appear and testify. *Blackmer v. United States,* 284 U. S. 421 at 438.

In *Wilson v. State,* 57 Ind. 71, the court stated the rule as follows at page 73:

> "The return of the sheriff in this case supplied the place of an affidavit, and, we think, laid a sufficient foundation for either a rule or an attachment."

Both that proceedings to punish for contempt may be begun by attachment and that, in cases such as disobedience of subpoena personally served, the attachment may be issued without affidavit or other showing before the court is stated in 13 *C. J.* 68-9, §93, where it is said in part:

> "Before a person can be found guilty of a contempt *not committed in the presence of the court* he must have due and reasonable notice of the proceeding. A rule to show cause, *an attachment*, or other process should issue. The notice usually given is by the issuance of an order on him to show cause why an attachment should not issue, and the court may order the rule to show cause to be renewed, where the original could not be served in time, or where its recitals are defective. In some cases, however, an attachment may issue in the first instance without the granting of an order to show cause, as where all the evidence is before the court and the offense is clear, * * * or *against a defaulting witness who has been duly subpoenaed*, * * *. Under the practice and statutory provisions in some jurisdictions proceedings for contempt of court may be begun by warrant of attachment as well as by rule to show cause." (Italics ours.)

Such an attachment is really for the purpose of enforcing an order to appear; and it is appropriately issued after personal service of subpoena and without further notice to enforce the order embodied in the subpoena. See *Ex parte Merrill*, 245 Fed. 778, 780-1. Hence, Section 11511 properly and in strict compliance with every requirement of due process of law provides for the institution of contempt proceedings against an intended witness who has failed to obey a subpoena personally served without further notice or showing. On the other hand, Section 11511 provides that when a witness has not been personally served, the magistrate shall not issue an attachment without by rule ordering the intended witness "to show cause why an attachment should not issue against him." It is thus apparent that the Ohio statutes have been drawn with intelli-

gence and discrimination and fully comply with every requirement of due process of law. Where the contempt is committed in the face of the court or the examining magistrate, commitment for the contempt *may* follow without further notice or hearing. Where the return of the officer shows that a witness has disregarded a subpoena personally served, proceedings to punish for contempt *may* be commenced by an attachment issued on such showing on the records of the court or magistrate. When it does not appear that the absent witness has been personally served, no attachment may be issued except on order to show cause issued to and served upon the absent witness.

We are here dealing with the question whether under the statutes of Ohio there is a defect in due process arising from absence of notice and opportunity to be heard. We are not at the moment concerned with a different question of whether there is a defect in due process because the notice and opportunity to be heard is before a court or magistrate without jurisdiction. If, as the appellee submits, the statutes constitutionally authorize commitment for a contempt committed in the presence of the examining magistrate without further notice and opportunity to be heard, as in the case of the appellant Bevan, and constitutionally authorize the issuance of an attachment upon the return of an officer showing that the subpoena was personally served and thereby to institute a proceeding to bring the witness before the magistrate for hearing to "answer for the contempt," as in the cases of the appellants, Koehrman and Stranahan, then these appellants can found no right to release upon a claim that the statutes provide no notice or opportunity to be heard; and they are in this aspect of the matter remitted solely to the contention that the magistrate before whom the notice and hearing is provided is without jurisdiction or that the statutes violate due process of law in some respect other than denial of notice or hearing.

B.

A Notary Public Proceeding Under Sections 11510, 11511 and 11512 Pursuant to the Provisions of Section 11529, is Not Without Jurisdiction Under the Decisions of the Supreme Court of Ohio or Under the Fourteenth Amendment to Exercise the Power to Hear and Determine Conferred Upon Examining Officers Before Whom Depositions Are Taken Under Sections 11510, 11511 and 11512.

The appellants argue that even though the Ohio statutes provide for notice and hearing and satisfy every requirement of due process of law, there is nevertheless an unconstitutional denial of due process whenever these statutory powers are exercised by a notary, for the reason, as they erroneously contend, that a notary in Ohio is without jurisdiction to exercise such powers. To sustain that conclusion, it would be necessary to find that under the statutes a notary exercises no discretion as to whether he will commit a witness for contempt for refusal to answer, or issue an attachment for failure to appear. It is at once apparent that this is in the teeth of the plain language of the statutes. Section 11510 and Section 11511 provide that a notary "*may*" punish for contempt and "*may*" issue an attachment. Clearly, a determination of both issues is committed to the discretion of the notary by the statutes, and, obviously, he is granted the power to exercise that discretion. It is absurd to contend that a statute gives an officer power to commit for contempts, as in such statutes defined, but withholds from the officer the power to consider and determine whether a contempt, as defined by such statutes, has been committed. The decisions of the Supreme Court of Ohio lead to no such absurdity.

1.

The decisions of the Supreme Court of Ohio cannot be construed to deprive a Notary Public, acting as an examining magistrate, of the power, clearly conferred by the deposition statutes, to hear and determine whether a contempt, as defined in such statutes, has been committed.

In the face of the clear and unambiguous language of the statutes, the appellants have taken the six decisions of the Ohio Supreme Court (*DeCamp v. Archibald*, 50 O. S. 618; *Ex Parte Jennings*, 60 O. S. 319; *In re Rauh*, 65 O. S. 128; *Ex Parte Schoepf*, 74 O. S. 1; *Benckenstein v. Schott*, 92 O. S. 29, and the decision below, *Ex Parte Bevan*, 126 O. S. 126) dealing with these sections of the Ohio General Code and by extracting a paragraph from one and a phrase from another, have attempted to build up an argument for their contention that a notary public is without jurisdiction to exercise the power to hear and determine whether a contempt has been committed and that his judgment of commitment is the exercise of an arbitrary and summary power to commit for any disobedience justified or unjustified. (Appellants' Brief 14-28.) Appellants' contention is based upon the following propositions:

> "1. Sections 11497 and 11503 authorize the compulsion from a witness called for examination by deposition before a notary public, of only such evidence as is competent and relevant * * *." (Appellants' Brief 15.)
>
> "2. * * * a witness called for examination before a notary public under Section 11497 may lawfully refuse to answer a question or to produce a document or writing that is incompetent or irrelevant, and his refusal to obey the order of the notary public constitutes a contempt for 'an unlawful refusal to answer' within the meaning of Section 11510 only if the order

calls for the production of evidence that is competent and relevant." (Appellants' Brief 16.)

With these two propositions the appellee does not quarrel and it is conceded that they substantially state the law of Ohio as it now exists. However, the appellants continue their statement of propositions as follows:

> "3. * * * the notary public has no power to hear and determine the question of the competency or relevancy of the evidence sought to be elicited, in connection with and as determinative of, the question whether the witness has committed the offense of contempt as defined by statute." (Appellants' Brief 16.)
>
> "4. If the witness refuses to answer upon the ground that the answer is incompetent or irrelevant he does so at his own peril, for the notary public may summarily commit him for contempt, if indeed it is not the duty of the notary public so to do upon the request of the adverse party, without affording an opportunity for hearing on, and without making any determination of, and without power in the notary public at any time, or in any judicial tribunal before imprisonment of the witness, to hear and determine, the question whether the evidence demanded is competent and relevant and whether the witness has committed the offense charged." (Appellants' Brief 16.)

The statements set forth in propositions numbered three and four cannot be found in any decision of the Ohio Supreme Court. The repeated assertion of the appellants that under the decisions of the Supreme Court of Ohio a notary public is without jurisdiction to hear and determine whether a contempt, as defined in the deposition statutes, has been committed, rests upon an attempted perversion of selected excerpts from the language of the Supreme Court of Ohio in certain cases holding that the exercise of such power by a notary public does not contravene Article IV, Section 1 of the Ohio Constitution relative to the distribution of judicial power. The only attacks heretofore made

upon the system of taking depositions in Ohio, during the more than one hundred years of its existence, have been upon the basis that the deposition statutes, *by conferring the power to hear and determine these questions upon a notary public,* contravened the State Constitution.

The question presented by these attacks was not what constitutes judicial power in an abstract, academic or theoretical sense, but what was meant by "judicial power" as used by the people of Ohio in their Constitution when they vested all judicial power in the courts. The Supreme Court of Ohio answered that question by an examination and consideration of the public understanding of the phrase and the usages and customs of the State at the date when the State Constitution was adopted. It held that while the term "judicial power" as used in the State Constitution is comprehended by and falls within the power to hear and determine, it is much more limited in scope and does not exhaust that power. It pointed out that an officer presiding over the taking of depositions, whether a notary public or judge (and he may be either under Section 11529), does not have power to pass upon an objection to the relevancy or competency of the evidence when interposed by a party to the action in which the deposition is taken, or to pass upon whether the evidence taken on the deposition shall be admissible as between the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. It held, however, that an officer presiding over the taking of depositions, whether a notary or judge, has power to hear and determine *in relation to the rights of the witness* whether the witness may be lawfully required to testify or answer and whether a contempt, as defined in the deposition statutes, has been omitted. It held this power to hear and determine not to be embraced within the definition of "judicial power" as used in the Ohio Constitution and for that reason the depo-

sition statutes have been held immune to attack upon the ground that they conferred judicial power upon officers other than courts in contravention of the State Constitution. Whether the State court thus correctly interpreted the State Constitution presents no Federal question. *Carfer, Sheriff v. Caldwell,* 200 U. S. 293, 297. However, it is in that sense that ever since the decision of *DeCamp v. Archibald,* 50 O. S. 618, 625, in 1893, the language that a notary or other officer presiding over the taking of depositions does not exercise judicial power has been used and understood in the jurisprudence of Ohio. Such language has been used in that sense whenever the attack has been renewed or when the court has had occasion to make passing reference to the principle in cases where it was not directly involved.

Thus, notwithstanding the previous decisions of the Supreme Court of Ohio, the appellants in these cases in the State courts vigorously renewed the contention that the deposition statutes of Ohio are unconstitutional as in contravention of the Ohio Constitution because they confer upon notaries public and officers other than courts the power to hear and determine whether a contempt, as defined in the deposition statutes, has been committed. It was in answer to this contention and *vis-a-vis* the State Constitution that the Supreme Court of Ohio in these cases said in its syllabus that judicial power is not exercised by a notary public, pursuant to the deposition statutes, in committing to jail witnesses who refuse to answer questions and in attaching and committing to jail witnesses who disobey the order of their subpoenas.

It is therefore manifest, as will hereinafter more clearly appear from a critical examination of the cases, that the bald assertion of the appellants of lack of power in the notary public to hear and determine is not only unsupported by but in contradiction of the well settled law

of Ohio as interpreted by the State Supreme Court and the whole argument of the appellants upon this point falls to the ground.

It is the law of Ohio that the syllabus prepared by the entire court states the law of the case rather than the opinion which may or may not indicate the views entertained by the concurring majority. *Rule of Practice VI of the Ohio Supreme Court*, 122 O. S. lxviii; *State ex rel., v. Edmondson*, 89 O. S. 93 at 107. We shall, therefore, first consider the syllabi of the six decisions of the Ohio Supreme Court discussed at length by the appellants.

In *DeCamp v. Archibald*, 50 O. S. 618 (1893), the syllabus reads:

> "1. The power of a notary public in taking depositions to punish a contumacious witness, is not limited by section 119, Revised Statutes (Ohio General Code 126), to the powers in that regard conferred on justices of the peace by sections 6541 and 6542, Revised Statutes. (Ohio General Code 10318, 10319.) By being included in section 5269, Revised Statutes (Ohio General Code 11529), he has the further power of imprisoning for contempt, conferred on 'an officer' taking depositions, by sections 5252 and 5254, Revised Statutes. (Ohio General Code 11510, 11512.)
>
> "2. The power conferred by sections 5252 and 5254, Revised Statutes (Ohio General Code 11510, 11512), on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial *in the sense of the constitution*, conferring all judicial power upon the courts of the state.
>
> "3. Where the question propounded involves no question of privilege on the part of the witness, it is his duty to answer, if ordered by the notary to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken; and if he refuses to do

so, when ordered, he may be committed as a contumacious witness." (Italics ours.)

By this decision it was settled that the grant to officers other than courts of power to hear and determine whether a contempt, as defined in the deposition statutes, has been committed is not void as in contravention of the Ohio Constitution. The *ratio decidendi* of this decision and the subsequent decision of *Benckenstein v. Schott*, 92 O. S. 29, hereinafter discussed, is that the notary *in exercising the power to hear and determine* whether a witness shall be committed as for contempt for failure to appear or refusal to answer is not the kind of power to hear and determine which is vested exclusively in the courts by the grant of judicial power in Article IV, Section 1 of the Ohio Constitution. If no power to hear or determine exists, obviously no question of the exercise of judicial power in contravention of the State Constitution could be presented for determination. That the Supreme Court of Ohio has twice found it necessary to differentiate the power of a notary to hear and determine from the judicial power to hear and determine granted exclusively to the Ohio courts, is a complete answer to the claim of the appellants that such power to hear and determine does not exist. In fact this decision expressly holds that a notary has power to hear and determine but that it is not the kind of power to hear and determine which is vested exclusively in the courts. While this case also determined within the limits of its facts what testimony a witness might lawfully be required to give and conversely when the refusal of a witness to answer would be unlawful and a contempt under the statutes, it naturally did not preclude the possibility of further definition of contempt under the statutes.

In *Ex Parte Jennings*, 60 O. S. 319 (1899), the syllabus reads:

"A witness whose deposition is being taken before an officer may refuse to testify to facts not relevant to the issues in the case in which the deposition is to be read, if the disclosure of such irrelevant facts would be injurious to the business of the witness; and, if imprisoned by the officer for such refusal, he may be discharged on *habeas corpus.*"

This decision merely constituted a further definition of what questions a witness might lawfully refuse to answer, or stated in another way, what constitutes a contempt within the meaning of the deposition statutes. It held that a witness might lawfully refuse to answer any irrelevant question injurious to his business.

The syllabus of *In re Rauh*, 65 O. S. 128 (1901), reads:

"1. A deposition may be taken at any time after service of summons upon the defendant in the action, but it can be used on the trial only in the cases prescribed in Revised Statutes, Section 5265 (Ohio General Code 11525); and the deposition of any witness, whether a party to the action or not, may be so taken.

"2. A subpoena issued by a notary public for a witness to attend and testify in a deposition before the notary public may contain a clause directing the witness to bring with him any book, writing or other thing under his control, which he may be compelled to produce as evidence, and for disobedience of such a subpoena the notary public has power to punish the witness for contempt, by imprisonment."

This case further construed contempts as defined in the deposition statutes. It held that a refusal to produce material and relevant documents in response to a subpoena *duces tecum* issued by a notary public on the taking of a deposition constitutes a contempt within the deposition statutes.

Finally the delimitation of contempts, as defined in the deposition statutes of Ohio, was carried to a logical conclu-

sion in *Ex Parte Schoepf*, 74 O. S. 1 (1906). The syllabus reads:

"1. The clause in section 5247, Revised Statutes (Ohio General Code 11503), 'which he may be compelled to produce as evidence,' and as used in *In re Rauh*, 65 Ohio St., 128, must be construed with section 5289, Revised Statutes (Ohio General Code 11551), and is therefore limited to evidence pertinent to the issue, in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery.

"2. The rule in chancery as to compelling the production of documents for the purpose of evidence and inspection was and is that a party is entitled to a discovery of such facts or documents in his adversary's possession or under his control, as are material and necessary to make out his own case; but that this right does not extend to a discovery of the manner in which the adverse party's case is to be established, nor to evidence which relates exclusively to the adverse party's case.

"3. Where pursuant to a standing rule of the company, a report was made to the company's claim agent, * * * such report is a privileged communication and its production cannot be enforced in the taking of depositions in such suit before the trial.

"4. While an officer before whom a deposition is being taken is empowered to punish as for contempt any person who refuses to obey an order to answer a question or to produce a document, he cannot do so unless it is so 'lawfully ordered'; and where such question or document is not pertinent to the issues tendered or made, or is not material or necessary to make out the case of the party calling for it, or is incompetent or privileged, the witness cannot lawfully be ordered to answer such question or to produce such document."

This decision is the basis of the first and second of the propositions hereinbefore quoted from appellants' brief (see p. 22, *supra*). The case simply holds that a

witness may lawfully refuse to answer a question or produce a document where such question or document is immaterial, incompetent or privileged. It is, of course, manifest that the foregoing cases subsequent to *DeCamp v. Archibald, supra,* simply construe the deposition statutes to determine what constitutes unlawful refusals to answer or produce documents, and hence contempts, within the definition of such statutes. They do not furnish the slightest basis for a contention that the notary public is without power to hear and determine, held lawfully to be vested in such officer by *DeCamp v. Archibald, supra,* whether the disobedience or refusal of the witness constitutes a contempt as defined in the deposition statutes as they have been construed by the Supreme Court of Ohio.

The decision in *DeCamp v. Archibald, supra,* and the validity of the statutory scheme for taking depositions in Ohio with respect to the Federal Constitution was specifically affirmed in *Benckenstein v. Schott,* 92 O. S. 29 (1915). The syllabus reads:

> "1. A commissioner appointed by a court of another state to take depositions in Ohio is an officer in the sense in which that term is used in Section 11510, General Code.
>
> "2. That section as applied to such commissioner who seeks to punish a witness for contempt for his refusal to be sworn as a witness is constitutional."

In this case the court specifically held that the requirements of due process under the Fourteenth Amendment of the Federal Constitution with respect to affording notice and opportunity to be heard whether a contempt had been committed, as defined in the deposition statutes, was fully met by the power conferred upon non-judicial officers by such statutes.

Finally each point of law as ultimately developed has been reaffirmed by the Ohio Supreme Court in the instant

cases of *Ex Parte Bevan, Koehrman* and *Stranahan.* The material paragraphs of the syllabus read:

> "1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpoena.
>
> "2. The General Assembly did not violate any provision of the federal or state Constitution in the enactment of sections 11510, 11511, and 11512, General Code, in delegating such power to notaries public. *De Camp v. Archibald,* 50 Ohio St. 618, and *Beckenstein v. Schott,* 92 Ohio St. 29, approved and followed.
>
> "3. A witness committed by a notary public, under sections 11510, 11511, and 11512, General Code, has his remedy under section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross examination under the statute, the further right to test the relevancy or competency of the questions, and to demand his privilege, is preserved to him in the trial court."

Thus in the instant cases the Supreme Court of Ohio, in response to appellants' renewal of the ancient attack upon the deposition statutes upon the ground that such statutes, by conferring the power to hear and determine whether a contempt as defined in such statutes has been committed upon an officer other than a court, contravened the section of the State Constitution vesting all judicial power in the courts, reaffirmed its previous holdings that such power to hear and determine does not constitute "judicial power" in the sense in which that term is used in the pertinent section of the Ohio Constitution. The State court specifically reaffirmed its decision in *DeCamp v. Archibald, supra,* on that point. It reaffirmed its previous construction of the statutory contempts defined by the deposition statutes. It reaffirmed its holding that the grant

of power to officers other than a court to hear and determine whether a contempt, as defined in the deposition statutes, has been committed, satisfies every requirement of due process of law under the Federal Constitution and specifically approved *Benckenstein v. Schott, supra,* on that point. Each of the decisions of the Ohio Supreme Court hereinbefore quoted and analyzed may be searched in vain for any support for the appellants' erroneous contention set forth in their third and fourth propositions hereinbefore quoted. (See p. 23, *supra.*)

It is difficult to follow the refinements, ramifications and contradictions of appellants' argument, but they apparently seek to base their contentions upon the three following errors.

1. An unsupported and fallacious assumption that although the definition of what constitutes a contempt, as defined by the deposition statutes, which was set forth in *DeCamp v. Archibald, supra,* has been further clarified and settled by subsequent decisions of the Ohio Supreme Court, such further definition and clarification of what constitutes contempts under such statutes did not result in a corresponding delimitation of the lawful exercise of the power of a notary public to commit for contempt under such statutes so that the judicial definition of what constitutes contempts and the judicial definition of what constitutes the lawful exercise of the power of a notary to commit for contempt under the deposition statutes, are no longer coextensive or reciprocal. The fallacy of this contention is manifest from its mere statement.

2. A refusal to recognize the distinction between passing on questions of evidence so as to bind the parties to the lawsuit, a function belonging solely to the trial judge, and determining the same questions in a collateral proceeding *in re* the witness.

3. A misconception of the meaning of the statement appearing in several of the decisions that the witness disobeys the notary at his peril, a consequence of disobedience to the order of any competent judicial or other tribunal.

Appellants argue that since it was held in *DeCamp v. Archibald, supra,* under the facts of that case, that a witness could not lawfully refuse to answer a question except on the ground of privilege, a notary may now lawfully commit a witness for refusal to answer an incompetent or irrelevant question although subsequent decisions of the Supreme Court of Ohio have further delimited the obligation of a witness to answer under the deposition statutes by enlarging his rights so that he may now lawfully refuse to answer any incompetent or irrelevant question. They thus seek to draw the deduction that while subsequent decisions of the Supreme Court of Ohio have enlarged the scope of the questions which a witness may lawfully refuse to answer, the same decisions have not limited the definition of contempts, as defined in the deposition statutes, for which the notary public may lawfully commit for contempt. It is, of course, manifest that the court has gradually delimited contempts as defined in the deposition statutes and that, in so doing, it has settled, on the one hand, the lawful rights of the witness, and on the other, the lawful exercise of the powers of the officer before whom the deposition is taken. The contradictory and unsubstantial character of the appellants' argument is manifest.

The extremities to which counsel have been driven in their attempt to sustain this point is well illustrated by their reference to the suggestion of Judge Stephenson in the opinion below that a notary public might in a proper case be mandamused to commit a recalcitrant witness. The appellants seek to torture this dictum into the absurd contention that the courts of Ohio would mandamus a

notary to commit a witness who had lawfully refused to answer and upon application of the witness after his commitment would forthwith release him. (Appellants' Brief, 24-25.)

The keystone of the appellants' argument is based on the statement contained in the third syllabus of *DeCamp v. Archibald, supra*:

> "The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken."

and similar statements contained in the opinions in the cases of *Ex Parte Jennings, supra*, and *In Re Rauh, supra*. It is manifest that the statement as used in the syllabus of *DeCamp v. Archibald, supra*, referred to the exclusive function of the trial court to pass on such questions as between the parties to the action. Moreover, in that case the Court expressly sustained the power of a notary public to hear and determine in relation to the rights of the witness whether a contempt, as defined in the Ohio deposition statutes, had been committed and whether the witness might lawfully be required to answer. At page 625 of the Opinion, it is said:

> "The term 'judicial power' as used in the constitution is not capable of a precise definition. It is included in the power to hear and determine, but does not exhaust the power. That it embraces the hearing and determination of all suits and actions, whether public or private, there can be no doubt. But we think that it is equally clear that it does not necessarily include the power to hear and determine a matter, that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights, is conferred upon and exercised by administrative and executive officers."

All basis for appellants' contention as to the power and duty of the notary to examine and determine the lawfulness or unlawfulness of the witness' refusal to answer is swept away in the opinion of *Ex Parte Jennings, supra,* at page 328:

"* * * The language of the section conferring authority upon the officer to punish a witness for refusing to answer 'when lawfully ordered' implies that punishment cannot be imposed for every refusal.

"It is familiar that an objection to the competency of the evidence to be elicited, *when interposed by a party to the action* in which the deposition is taken, cannot be either sustained or overruled by the officer. In such case the question of competency is for the court. But it seems quite consistent with the purpose for which depositions are taken that a witness may refuse to make disclosures which would operate to his personal prejudice without aiding the court in determining the rights of the parties, by reflecting either upon the issues in the case or upon the credibility of the witness. Accordingly the settled law upon the subject is as stated in *Church on Habeas Corpus,* section 319: 'The law has not invested such officers (notaries public) with arbitrary and omnipotent power to compel a witness to answer all questions however incompetent, irrelevant, immaterial or inadmissible. A refusal to answer such questions is not necessarily a contempt. To have power to commit for contempt, the notary must exercise his functions substantially in the manner and under the circumstances prescribed and contemplated by law. It has, therefore, been held that a witness will be discharged on *habeas corpus* where he has been committed for contempt by a notary public for failing or refusing to produce papers and testimony that are incompetent and inadmissible.' *Proffatt on Notaries,* section 31; *In re Beardsley,* 37 Kas., 666; *Ex parte Krieger,* 7 Mo. App., p. 637.

"The conclusions stated must be sound, unless the officer taking a deposition is released from limitations which the law imposes upon the authority of the judge before whom it is to be read, since a witness examined in court is not guilty of contempt in refusing to answer an incompetent question." (Italics ours.)

The statements in none of these cases go further than to point out that questions as to the admissibility of evidence as between the parties to the action can only be decided by the judge presiding over the trial of that action or by a court reviewing his decision. If it were to follow from this obvious rule that the trial court also had exclusive jurisdiction to pass on similar questions in connection with a witness' refusal to answer, then all courts and judges reviewing the notary's action on *habeas corpus* or under Sec. 11514 would be likewise precluded from hearing or determining such questions. But in *Ex Parte Jennings, supra,* the very case relied upon by the appellants to prove that the trial judge alone has power to pass on such questions to the exclusion of the notary, the Supreme Court of Ohio, reviewing the collateral proceeding of *habeas corpus,* considered at length the question of the competency and relevancy of the evidence sought to be elicited.

The distinction between the power to pass on the admissibility of evidence in the suit in which the deposition is to be used and the power to hear and determine whether the witness has unlawfully refused to give his deposition or unlawfully refused to answer a question has been consistently recognized by the Ohio authorities. In *Ex parte Woodworth,* 6 Ohio Dec. 19 at page 21, the court said:

"It is said that a notary public when taking a deposition has not power to decide as to the competency or relevancy of a question. For the purposes of the deposition and of the case in which the deposi-

tion is taken, he has not. But for the purpose of punishing a witness for contempt, he has. A notary public in committing a witness for contempt exercises judicial power. (21 Neb., 270.) The exercise of that power requires that he should find a witness who refuses to answer a question guilty of contempt. To find the witness guilty of contempt, the notary must determine whether the question asked was one which the witness could lawfully be ordered to answer; the determination of that fact necessarily requires the notary to pass on the competency of the question. *Proffat on Notaries,* 2 Ed., page 46."

The rule is stated in 14 *Ohio Juris.* 38 as follows:

"Questions relating to the admissibility of the evidence to be elicited by particular questions propounded to a witness, testifying by deposition, cannot be finally decided by the officer before whom the deposition is being taken, such questions being reserved for the determination of the court when the deposition is offered in evidence. Such officer may, however, order the witness to answer, when in his opinion the question is proper, and, while it has been said that the officer before whom a deposition is being taken has no power to excuse the witness from answering, except as to such questions as would tend to incriminate him, it seems clear that the officer has the right to exercise his discretion as to whether or not he will order the witness to answer, and so, for such purpose, he is empowered to make a tentative or provisional determination as to the propriety of the question or the admissibility of the testimony sought to be elicited. Objections and exceptions made during the taking of the deposition should be noted thereon."

This distinction drawn in the Ohio authorities is familiar in Federal practice. *Nelson vs. United States,* 201 U. S. 92, 114; *Dowagiac Mfg. Co. vs. Lochren* (8 C. C. A.), 143 Fed. 211, 215.

In a final attempt to prove their proposition that the notary has no power to hear or determine, appellants have

seized upon the statement made in *Ex Parte Jennings, supra, In re Rauh, supra,* and *Ex Parte Schoepf, supra,* that the witness disobeys the notary at his peril, but obviously there is no inconsistency between this statement of the Ohio Supreme Court and the principle that the notary may determine, as far as the witness is concerned, whether the witness can be legally ordered to answer. Even after the most complete of hearings and determinations by the officer, notary or judge, the witness acts at his peril when he refuses to answer, for if the reviewing court finds that the original determination was correct, the witness must remain in jail until he obeys. It is obvious from an examination of *Ex Parte Jennings, supra,* at page 331, that the statement that a witness refuses to answer at his peril was made by the court in order to emphasize the rule that the sincere belief of the witness as to the impropriety of the question propounded will not excuse his refusal to answer if as a matter of law the question is a proper one. One disobeys an order of a court at his peril but that does not mean that the court is without jurisdiction to determine whether his disobedience constitutes contempt.

Another favorite variation of this argument by appellants is that, since the witness refuses to answer at his peril, the notary may commit the witness whether his refusal to answer was in fact lawful or not. If this argument means anything, it is merely to say that the officer may err. Even courts sometimes err, but the possibility that either a court or an officer may err does not make it unconstitutional for courts or officers to hear and determine matters entrusted to their decision.

Ultimately the question now before this Court, *i.e.,* whether the statutory scheme of Ohio affords due process of law, was met by the Supreme Court of Ohio in the case of *Benckenstein v. Schott, supra,* where it was stated at page 41:

> "It is said by the supreme court of the United States that due process of law has never been precisely defined, but it does not require a plenary suit or a trial by jury, nor is it necessarily judicial procedure. In *Iowa Central Ry. Co. v. Iowa*, 160 U. S., 389, it is held: 'The fourteenth amendment to the constitution in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided.' We think these requirements are met by the procedure provided in the statutes under consideration, and we are unable to say that there has been a failure of due process of law in the proceeding which is challenged by plaintiffs in error."

The court there adopted a rule, namely, notice and hearing before decision on the issues, which necessarily included a determination and exercise of discretion by the notary.

2.

The delegation of power to an officer other than a court or judge to hear and determine whether a witness has committed a contempt, as defined in the deposition statutes, does not deny due process of law. A right of appeal or review is not an essential element of due process, and manifestly the provision for a full, free and untrammeled judicial review of all questions of fact or law afforded by Section 11514, Ohio General Code, can not violate the Fourteenth Amendment, but only evidences the care of the State to safeguard every legitimate interest of a witness.

The appellants first purport to recede from the untenable proposition, urged in the courts below, that due process of law requires a hearing before a court or judge and

that the Ohio deposition statutes, in providing for hearing and determination by a notary public, are therefore void under the Fourteenth Amendment as denying due process. (Appellants' Brief, 29.) However, throughout their brief in this Court they assert that due process requires notice and opportunity to be heard "by a court having jurisdiction" (Appellants' Brief, 31), and finally appellants return to their argument, advanced below, by citation and quotation of cases holding that under the particular Constitution involved judicial power could not be conferred upon an administrative or non-judicial officer. (Appellants' Brief, 47-52.) Of course, if the proceedings *are* before a court, the court must have jurisdiction; but noth ng is better settled than that so long as there be given notice and opportunity to be heard before an officer or tribunal having jurisdiction, a hearing need not be before a court, judge or judicial tribunal to constitute due process of law. *Dreyer v. Illinois*, 187 U. S. 71, 83; *Reetz v. Michigan*, 188 U. S. 505. In the syllabus in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, it is said:

> "Nothing in the Federal Constitution prohibits a State from conferring judicial functions upon non-judicial bodies."

In *Crowell v. Benson*, 285 U. S. 22, Mr. Chief Justice Hughes, in discussing whether Congress could make the findings of a Deputy Commissioner, in the enforcement of the Longshoremen's Compensation Act, on the facts upon which the jurisdiction of the officer under the statute and the constitutional power of the Congress depended, final so as to preclude a review by the courts, said at page 56:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. *Nor have we simply the question of due process in relation to notice*

and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend."

And then at page 57:

"In this aspect of the question, the irrelevancy of State statutes and citations from State courts as to the distribution of State powers is apparent. *A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority.*" (Italics ours.)

It is necessary to distinguish cases where particular statutes conferring certain powers upon officers or tribunals have been held to be unconstitutional as in violation of provisions of particular constitutions requiring a separation of legislative, executive and judicial powers, or vesting all judicial power in certain courts, so that the officer or tribunal was without jurisdiction. In such cases there is, of course, a denial of due process because of the absence of jurisdiction, *but the denial of due process does not rest upon the circumstance that the power to hear and determine has been conferred upon an officer other than a court or judge, but upon the proposition that the attempt to endow the officer or tribunal with such power has failed because of the prohibition of a wholly different section of the particular Constitution.* However, the Ohio Supreme Court has construed the Ohio Constitution not to prohibit the grant of such power to an officer other than a court; and it is elementary that the construction of a State Con-

stitution by the highest court of the State is binding upon and will not be reviewed by this Court. Thus in *Carfer, Sheriff v. Caldwell*, 200 U. S. 293, the petitioner sought release in *habeas corpus* from a commitment issued by the House of Delegates of West Virginia. It was contended that this power could not be conferred upon a committee of the State Legislature. In holding that this raised no question under the due process clause, the court said at page 297:

> "The Circuit Court was of opinion that the subject which the committee was appointed to investigate was not within the jurisdiction of the legislature, as defined by article 5 of the constitution of West Virginia, declaring that 'the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.' But that objection does not 'present any question under the due process of law clause of the Fourteenth Amendment.' *Dreyer v. Illinois*, 187 U. S. 71, 83; *Reetz v. Michigan*, 188 U. S. 505."

Many other cases could be cited to support the principle that due process of law does not require a hearing before a court, judge or judicial tribunal. Thus in *Kilbourn v. Thompson*, 103 U. S. 168, relied upon by appellants, it was held that the House of Representatives might exercise judicial power in appropriate cases. Yet, if this had been a question of due process of law, the holding would have been in the teeth of the Fifth Amendment of the Federal Constitution.

The appellants cite Federal decisions and decisions from other States to the effect that power to punish for contempt, being judicial in nature, could not *in those jurisdictions* be conferred upon officers other than courts or judges. (Appellants' Brief, 47-52.) All of the State cases cited turn upon the separation of powers under the re-

spective State Constitutions. That they are inapposite is manifest. To the extent that the concept of due process is involved at all in such decisions, it rests solely upon the question whether under the particular State Constitution the grant of power to the officer is void so as to leave the officer without jurisdiction. That is, the resulting denial of due process does not rest upon the circumstance that the power to hear and determine has been conferred upon an officer other than a court or judge but upon the proposition that the attempt to endow the officer with such power has failed because of the prohibition of a wholly different section of the particular Constitution. In States whose Constitutions, like the Ohio Constitution, do not prohibit the grant of such power to such officer other than a court or judge, it is well settled that no denial of due process results. *Noell v. Bender, Sheriff*, 317 Mo. 392, 295 S. W. 532; *Dogge v. State*, 21 Nebr. 272, 31 N. W. 929. Likewise, Federal cases, such as *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, involving the separation of powers under the Federal Constitution, are clearly without application.

People v. Leubuscher, 34 App. Div. 577, 54 N. Y. S. 869, involved, in addition to the question of separation of powers, the further proposition that a Colorado Court could not appoint a commissioner to take testimony in New York State and confer upon the Commissioner the power to sit in New York State and punish witnesses for contempt in New York State. This resulted from the elementary proposition that the process of a State cannot be made effective beyond its geographical jurisdiction.

Likewise, *Ward Baking Co. v. Western Union Telegraph Co.* 200 N. Y. S. 865, 205 App. Div. 723; *In re Ziebold*, 23 Fed. 791 and *In re Sims*, 54 Kans. 1, 37 Pac. 135, involve, in addition to the question of separation of

powers under State Constitutions, the further objection that the statute conferred upon one officer mixed judicial and other powers simultaneously to be exercised by such officer in such a way as to pass upon the propriety and validity of his contemporaneous acts, *i.e.*, such as permitting a Prosecuting Attorney to hold an inquiry and simultaneously determine the propriety and validity of his questions put as Prosecutor and his other actions taken as Prosecutor. Clearly none of these cases are any authority for the proposition that the delegation of power to commit to a Notary violates the Fourteenth Amendment.

Finally the appellants contend that even if the notary has been lawfully granted under the statutes of Ohio the power to hear and determine whether a contempt, as defined in the Ohio deposition statutes, has been committed, and, if he so determines, to punish as for contempt, the Ohio deposition statutes are nevertheless void because the provision for court review on both facts and law follows rather than precedes commitment for contempt or attachment to institute contempt proceedings. (Appellants' Brief, 45-52.) The appellants base this contention upon *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U. S. 287 and *Crowell v. Benson,* 285 U. S. 22. Appellants' proposition is that where power has lawfully been conferred upon a non-judicial officer to do a certain act, it is a denial of due process of law for the officer to do the act before it has been reviewed by a court; and obviously the action cannot be reviewed by the court until it has been taken by the officer. It is like the classical statute which forbade any railroad train meeting another at a railroad intersection from proceeding until the other had passed. The point in *Ohio Valley Water Co. v. Ben Avon Borough, supra,* was not that no judicial examination preceded the fixing of the rates by the State Commission but that the State stat-

utes and procedure permitted no judicial review of whether the rates so fixed were confiscatory. In *Crowell v. Benson, supra,* it was not held that the Longshoremen's Compensation Act was unconstitutional because it did not provide for a judicial determination *before* action by the administrative officer, but that it was constitutional because it did provide for judicial review, *after the action* of the administrative officer, of his findings on questions of fact determinative of the existence of the officer's jurisdiction and determinative of the existence of the constitutional right asserted. The *Crowell* case simply holds that a statute cannot constitutionally make the findings of an administrative officer or tribunal final on questions of fact which are determinative of the jurisdiction of the officer or tribunal, or determinative of constitutional rights asserted before such officer or tribunal so as to preclude a review by the courts. It held that the Federal statute could not constitutionally prevent a review by the Federal Court of whether the case in fact involved an employment in interstate commerce on Federal waters, for those facts constitute the basis of the alleged constitutional right sought to be asserted. But no more could the findings of fact of a State or lower Federal Court be made conclusive upon this Court where the determination is essential to the adjudication of a constitutional question. Clearly, the case in principle has not the most remote application to the cases at bar. *First,* the case does not hold, as counsel would make it appear, that even in the matter of jurisdictional facts and facts determinative of constitutional rights the court review must precede the action of the officer. *Second,* in the instant cases, a full, free and untrammeled review of the action of the committing magistrate, unprejudiced by any findings or conclusions on his part, is afforded by and has been had under Section 11514, Ohio General Code.

The distinction made in *Crowell v. Benson, supra,* which seems to confuse the appellants (Appellants' Brief, 46), arises out of the proposition that particularly in the Federal Government and to some extent in State Governments, there are matters legislative in character within the admitted field of legislative power with which, if it were not so inconvenient, the legislative power could deal directly and in detail by statute. In those cases the legislative power may delegate the exercise of the legislative function, under suitable standards, to administrative and executive officers and make their findings and conclusions final so as not to be subject to review by the courts, just as would be the similar action of the Congress or Legislature if taken directly. Such a matter is illustrated by the power of Congress to declare a bridge to be or not to be an obstruction to navigation, and the delegation of that power by Congress to the Secretary of War so that his action has the same effect. But this distinction has not the slightest application to the fallacious proposition urged by appellants.

C.

Even if Sections 11510, 11511 and 11512 Could Be Construed, as They Can Not, so as to Provide Only for Summary Action by the Examining Magistrate With Postponement of the Hearing Necessary to Satisfy Due Process, as Erroneously Urged by the Appellants, the Hearing and Determination Provided by Section 11514 Before the Conclusion of the Ohio Statutory Scheme for the Compulsion of Testimony Would Satisfy Due Process of Law in View of the Important Public Interest in, and the Compelling Requirements of, the Prompt and Efficient Administration of Civil Justice.

The appellants, indulging again in the fallacious assumption that the hearing provided before the notary does

not satisfy due process of law, contend that provision for relief after imprisonment does not afford due process and that these cases do not fall within the class of proceedings where due process permits postponement of judicial inquiry. (Appellants' Brief, 35-45.) Any discussion of the proposition urged by appellants is academic, since, as hereinbefore shown, the hearing afforded by the statutes before the notary satisfies every requirement of due process of law. The appellee has never, as suggested by appellants, urged the converse of appellants' proposition, for the reason that the facts in these cases render the proposition immaterial. However, were the question presented, appellee submits that these cases would fall within the class of proceedings where due process permits postponement of judicial inquiry.

Our previous discussion of the Ohio statutes and the powers thereby conferred upon notaries public as construed by the Ohio Supreme Court has, we believe, fully answered the technical questions of due process of law raised by the appellants. This discussion has been based upon the assumption that the restraint complained of by the appellants and from which they are seeking relief is the physical restraint imposed upon them by the technical arrest of the Sheriff. It is obvious, however, that their real complaint and the actual restraint which they are facing is not imprisonment, but the forced attendance at a deposition and the compulsion of testimony, oral and documentary. Clearly this is the substance of Ohio's statutory scheme and the underlying basis of these appeals. This Court has at numerous times held itself to be governed by substance rather than by form when determining whether the elements of due process are present. *Simon v. Craft*, 182 U. S. 427, *Louisville & Nashville R. R. v. Schmidt*, 177 U. S. 230. The subpoenas, orders, and writs of commitment and attachment issued by the notary are

but steps in the procedural scheme which is not completed until the witness has been compelled to attend, speak and give his evidence, the ultimate goal of the entire proceedings. Prior to this conclusion of the proceedings, the witness is afforded an opportunity for a full judicial hearing before any judge in the state, at which hearing, after the introduction of evidence and argument, it is judicially determined whether the witness must attend and give his evidence as ordered by the subpoena and the officer presiding at the deposition. We submit that this hearing afforded by Section 11514 satisfies the requirements of the Fourteenth Amendment.

Thus in the analogous case of *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, it was held at 551:

> "So long as a hearing is given before any proceeding is concluded to enforce the production of the papers, due process of law is afforded."

The fact that during the course of the proceedings an intermediate order is made by an administrative officer, even if this order standing alone did not afford due process of law as erroneously contended by the appellants, does not invalidate the procedural scheme as a whole. Many instances can be found in which this Court has approved a procedure under which a person is deprived of his property by preliminary administrative order without hearing subject to a review by the courts at the instance of the person so deprived. *Phillips v. Commissioner*, 283 U. S. 589; *Davidson v. New Orleans*, 96 U. S. 97. It is argued by the appellants that these cases are not applicable because they deal with the assertion of public rights against the property of the individual and are warranted only because public interest requires summary action. (Appellants' Brief, 41-44.) The distinction which appellants thus try to draw is manifestly non-existent for the public interest

in procuring the prompt and efficient administration of civil justice has an importance equal to, if not greater than, the collection of taxes or the imposition of public burdens upon private property.

The case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 and similar authorities cited by the appellants at pages 35-41 of their brief are manifestly inapplicable to the cases at bar in view of the ample notice and opportunity for hearing afforded by the proceedings before the notary. Those authorities are also readily distinguishable from the principle laid down in *Phillips v. Commissioner, supra*, that due process permits a postponement of judicial inquiry until the conclusion of the entire proceedings, especially where the public interest so demands, which principle we have suggested would govern these appeals were it necessary, which it is not, to rely on the hearing afforded by Section 11514. In the case of *Coe v. Armour Fertilizer Works, supra*, this Court declared unconstitutional statutes of Florida which permitted a judgment creditor of a corporation to levy execution upon the property of any shareholder of the corporation to the extent of his unpaid subscription to the company's stock as shown on the public records. Such execution could issue without any notice whatsoever to the shareholder. If, however, the levy were fortuitously discovered before the sheriff's sale, the shareholder might attempt to restrain the levy by injunction or motion, his defense being limited however to a showing that he was not a subscriber to the extent claimed or that his subscription had in fact been paid. The vice of such a statutory scheme is not that a preliminary lien has been placed upon the shareholder's property as to which he is subsequently notified and given a hearing, but that he may irretrievably lose his property before he receives notice that it has been levied upon and sold and consequently without any opportunity to present such defenses as he

may have. In the instant cases, however, from the moment of his arrest, which is notice of the most forceful character, the witness is given an opportunity to try out in any court he wishes the question whether he must forego his liberty and appear and testify. In the case of *Meyers v. Shields*, 61 Fed. 713, a suit to enjoin the collection of back taxes which had been assessed upon the property of the plaintiff without notice or opportunity for hearing, the only remedy available by statute was the right to interpose a defense in a suit to collect the taxes. This was but an unsubstantial remedy, for, as pointed out by the court at page 724, the collector might not elect to bring suit but instead might enforce the tax by distraint and sale in which event the taxpayer would have no opportunity to present his defenses.

III.

THE PROCEEDINGS HAD IN EACH OF THESE CASES STRICTLY COMPLIED WITH THE STATUTES AND DID NOT, AS A MATTER OF FACT, DENY DUE PROCESS OF LAW TO ANY OF THE APPELLANTS.

The contention that, even though the Ohio statutes are constitutional, the proceedings actually had in any of these cases constitute in fact a denial of due process of law is not open to any of these appellants on these appeals. (See Section I, pp. 11-12, *supra.*) However, the contentions of the appellants on this point are severally without merit.

A.

The Proceedings Had Before the Notary Public Did Not, as a Matter of Fact, Deny Any of the Appellants Due Process of Law.

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has al-

ready been shown. (Sec. II, A, pp. 14-20, *supra.*) The action of the notary was in strict conformance to those sections and satisfied every requirement of due process.

It is urged on behalf of the appellant, Bevan, that neither he nor his counsel received notice or were given an opportunity to be heard, that the notary did not conduct a formal hearing as to whether the witness' deliberate refusal to testify or produce any of the material called for by the subpoena *duces tecum* constituted a contempt and that the notary signed and issued the order of commitment in the absence of the appellant and without notice to him or his counsel. (Specification No. 2 of the assigned errors which are intended to be urged, Appellants' Brief, 8.) As to these points the record discloses that the appellant, Bevan, appeared pursuant to the notice and order of a subpoena *duces tecum* personally served upon him, which closed with the words "Hereof fail not under penalty of the law." (Bevan, 44-46.) In disregard of the ample notice afforded by his subpoena and the oral command of the notary the appellant refused to produce any of the records called for (Bevan, 52, 65) and after answering one or two preliminary questions refused to answer certain questions found by the Court of Appeals of Lucas County and the Supreme Court of Ohio to be material (Bevan, 54-65), and finally informed the notary that he would not answer any further questions. (Bevan, 66.) Without making any claim of privilege he attempted to show cause why he should not answer by stating that he refused on advice of counsel, which, as is stated in the opinion below, was no reason at all, and further through his counsel why he should not be required to answer or obey the subpoena *duces tecum.* (Bevan, 47-48, 56-66.) His counsel was notified by the notary that he intended to issue a writ of commitment. (Bevan, 110.) His contempt, as has hereinbefore been shown, was committed in the presence of the magistrate

authorized by law to commit him therefor, without further citation or hearing. It is clear, both on principle and authority, that one committing a contempt under such circumstances cannot defeat the exercise of that power by leaving before the process of commitment can be prepared, or before he is apprehended by the sheriff or bailiff. *Ex Parte Terry*, 128 U. S. 289, 311; see also p. 15, *supra*. In the determination of whether the commitment of a witness for contempt committed in the face of the committing power without further notice or opportunity to be heard, constitutes due process of law, it is manifestly immaterial whether the authority of the committing power so to punish rests upon a valid statute or is inherent.

Apparently the appellants, Koehrman and Stranahan, have abandoned their contentions that they were unconstitutionally denied due process of law by the proceedings and actions of the notary, for these claims have been omitted from their "Specifications of the Assigned Errors Which are Intended to be Urged." (Appellants' Brief, 6-11.) The abandonment of this contention was clearly well advised, for the action of the notary with respect to the appellants, Koehrman and Stranahan, was in strict conformance to Sections 11510 and 11511 which have heretofore been shown to meet every requirement of notice and opportunity for hearing. (Sec. II, A, pp. 14-20, *supra*.) The appellants, Koehrman and Stranahan, both disobeyed their subpoenas and failed to appear. Each of the subpoenas was personally served by the notary himself and that fact attested to by affidavit. (Kroehrman, 45, 68; Stranahan, 42, 65.) When it thus appeared that the appellants had disobeyed the subpoenas personally served upon them, the notary issued attachments commanding the Sheriff to attach their bodies and bring them respectively before him "to answer the State of Ohio for said contempt in disobeying said subpoena." (Koehrman, 45-46; Stranahan, 42-43.) The issu-

ance of the writ of attachment initiated the proceeding for hearing. The appellants refused such hearing and prevented it by untimely resort to the courts. (Koehrman, 36, 67; Stranahan, 36, 65.) They can base no rights on the absence of a hearing they thus prevented and refused to have. Any suggestion that a writ or warrant of arrest may not be signed or issued except upon additional notice to and in the voluntary presence of the person sought to be arrested is manifestly absurd.

Furthermore each of the three appellants, Bevan, Koehrman and Stranahan, has had the benefit of a full, free and untrammeled review pursuant to the provisions of Section 11514 by one of the State Courts of Appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State, its officials and tribunals. *Frank v. Mangum,* 237 U. S. 309, 327.

1.

Appellants' arguments that due process of law has not been afforded by the Ohio Statutes are severally either irrelevant or based upon the fallacious assumptions that the notary is without jurisdiction or that notice and an opportunity for hearing have, in fact, been denied.

In our previous discussion of the constitutionality of Sections 11510, 11511 and 11512, according to their terms (Sec. II, A, pp. 14-20, *supra*), we made no reference to those sections of Appellants' Brief which purport to argue against the validity of the statutes (Appellants' Brief, IV, 2, A, B, C, pp. 31-35) for the reason that the misleading principles and authorities there cited have no bearing on the question whether Sections 11510, 11511, and 11512 sat-

isfy the requirements of due process of law. It would be sufficient to dispose of these and many other contentions of appellants merely to point out that they severally rest upon the fallacious assumption that a notary under the laws of Ohio is without jurisdiction. However, we consider them briefly.

The proposition "A. Due Process Requires Notice and an Opportunity to Be Heard Before a Judicial Tribunal Empowered to Hear and Determine and Having Jurisdiction of the Subject Matter" (Appellants' Brief, 31) is totally irrelevant. It rests, as do practically all arguments of appellants, upon the fallacious and unsupported assumption that the notary is without jurisdiction. So far as it implies that due process forbids the delegation of the power to hear and determine to an officer other than a court or "judicial tribunal" we have hereinbefore shown it to be erroneous. See Section II, B, 2, pp. 39-46, *supra.*

The proposition "B. Notice Imports an Opportunity to Defend, and a Denial of the Benefit of Notice Is in Effect a Denial of Notice" (Appellants' Brief, 32) offers no attack upon the statutes, for clearly the statutes, according to their terms, do not deny the witness a hearing or any benefit of the notice given him unless reliance is again placed upon the unsounded hypothesis that a notary is without power to hear and determine. Nor are the authorities of *Londoner v. Denver,* 210 U. S. 373 and *Hovey v. Elliott,* 167 U. S. 409, made relevant by the facts, for as we have shown above, the procedure in the case of Bevan satisfied every requirement of due process of law as applied to contempts committed in the face of the committing magistrate and the appellants Koehrman and Stranahan can base no right to release upon the absence of a hearing which they prevented by untimely resort to the courts.

The proposition "C. Appearance Before the Notary for Examination Will Not Authorize Commitment With-

out Notice of the Charge of Contempt and Opportunity to Defend'' (Appellants' Brief, 33), which refers only to the case of Bevan, is based upon the fallacious premise that Bevan was wrongfully deprived of notice and an opportunity to defend. We have already shown that Bevan was notified by a subpoena that he would be required to testify, that he received specific orders to answer from the notary, that he was given ample opportunity to show why he should not answer, and that his counsel knew a writ of commitment would follow, unless he submitted to the notary's order. In the case of *In Re Rosser,* 101 Fed. 562, the referee in bankruptcy undertook to assess a money judgment against Rosser upon a mere citation to appear for examination. The inappositeness of that case to the one at bar is transparent.

Sections D and E of Appellants' Brief, pp. 35-45, to the effect that due process does not permit the postponement of judicial review and inquiry until after imprisonment is, of course, predicated upon the assumption that the prior proceedings before the notary public did not in themselves afford due process of law. We have already shown this assumption to be without basis in fact or law; and, hence both propositions urged by appellants are patently irrelevant. The answer to the cases of *Coe v. Armour Fertilizer Works,* 237 U. S. 413 and *Meyers v. Shields,* 61 Fed. 713, so far as appellants attempt to apply them to the instant cases, is that Bevan had all the notice and hearing required by due process for a contempt committed in the face of the magistrate and that Koehrman and Stranahan have prevented a hearing on the charges of contempt against them pursuant to their attachments by procuring the intervention of the court. However, at pp. 46-50, *supra,* we have given consideration to the academic question whether the judicial hearing afforded by Section 11514 does not satisfy the requirements of due process of

law with respect to the entire statutory scheme for compulsion of testimony, assuming for the sake of argument the appellants' fallacious contention that the proceedings before the notary did not meet those requirements, and we have there discussed the cases cited by appellants. Likewise, at pp. 44-46, *supra*, we have considered and shown to be without merit appellants' contention contained in Proposition F, Appellants' Brief, pp. 45-52, that the state law must provide an opportunity for submitting constitutional and jurisdictional questions to a court before commitment.

B.

The Suggestion that the Record Discloses a Disqualifying Pecuniary Interest of the Notary is Without Basis in Fact or Law, But, Were Such Disqualifying Interest Assumed to Exist, the Record Would Establish Both That It Was Waived by the Appellants and Cured by the Subsequent Review.

As has heretofore been pointed out (*supra*, pp. 9, 11) appellants' contention that the notary was disqualified by pecuniary interest, arises from the fact that, as authorized by statute, the notary acted as stenographer at the taking of the deposition and received for his services as such stenographer a flat fee of twenty-five cents per hundred words transcribed. The statutes, Section 11529 which authorizes the notary to take depositions, Section 11537 which authorizes the notary to also act as stenographer, Section 127 which authorizes the notary to charge the same fee as a Justice of the Peace for such services, and Section 1746-2 which allows a Justice of the Peace the above fee of twenty-five cents per hundred words, have never been questioned by the appellants, either in the proceedings below or in the assigned errors relied upon in this Court. Appel-

lants are therefore not in a position to attack a factual situation which is expressly authorized by State statutes which have not been questioned. Appellants' contention, however, even could it be raised, is manifestly without merit.

1.

The Notary had and has no disqualifying interest in fact.

Upon the record in these cases the notary had and has no disqualifying interest in fact within the rule of *Tumey v. Ohio,* 273 U. S. 510 or any other case cited by the appellants. The direct disqualifying interest laid down in the *Tumey* case was one where the committing magistrate's right to *any* compensation for the services rendered depended upon whether his decision should be adverse to the person committed. In the latter instance the magistrate was compensated. If he freed the defendant, he received no compensation for his services. Similarly, in *Meyers v. Shields, County Treasurer,* 61 Fed. 713, the County Treasurer received no compensation for his services unless he decided against the taxpayer. In the instant case the notary is compensated for the services actually performed; and his compensation for services actually performed is no greater and no less whether or not he commits the witness. (Bevan, 114-116; Koehrman, 91-93; Stranahan, 89-91.) The possibility that the length or extent of his services may be affected is incidental, collateral and remote. No case has been cited and we know of none where any court has ever held that such a circumstance constitutionally disqualified the officer to act. Every case cited by the appellants on the subject of disqualification is one where the right of the officer to any compensation for services actually rendered depended upon the nature of his decision. The supposed pecuniary interest of the notary,

if any, is of course only indirectly connected with his rulings and the assumption of interest is based upon a further assumption that the notary would be without employment if he did not prolong the taking of testimony. No evidence whatsoever was introduced in support of any such assumption and it is submitted that no such inference can be validly drawn. If an inferential desire for continued employment in the matter then at hand constitutes a disqualification under the due process clause of the Fourteenth Amendment, then no reference in which the Referee is paid on a per diem basis can be constitutional, the decision of the Referee being based on folios of testimony admitted or compelled by him for the ulterior purpose of lining his own pocket by prolonging the hearing, and any case decided by a Common Pleas Judge or Judge of the Court of Appeals of Ohio, sitting by assignment in a County other than his own, may be similarly attacked on the ground that in addition to his regular salary and expenses such Judge is entitled to $20.00 per day during the course of the case to which he has been assigned and may thus be influenced in his rulings on evidence. (See Ohio General Code, Sections 2253 and 2253-3.)

That the expectation of further employment does not disqualify a magistrate is shown by the case of *Commonwealth v. Keenan*, 97 Mass. 589. In this case the magistrate acted as his own clerk, and was thus entitled to fees. It was held at page 590:

> "The fees which the law gives for the performance of official duties in relation to civil or criminal proceedings, do not constitute an interest in the proceedings. They are to be regarded simply as an equivalent for the service performed. A magistrate is not disqualified to render a judicial decision because he may thereby make further official action necessary for which he will receive the appropriate compensation in fees.

> And the court are of the opinion that the case is not changed by the fact that such subsequent service is to be rendered, and fees received, in a different official capacity. The ground of interest relied upon to deprive the magistrate of the jurisdiction which he exercised in this case, is too remote and contingent to have that effect; and his interest is also, in legal estimation, equally balanced. The exceptions are therefore overruled."

In the case of *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, a statute provided for the assignment of a certain Judge to hold court in a certain county with additional compensation. In the course of the trial the Judge, in determining his jurisdiction, had to pass on the validity of the statute. It was urged that the Judge was disqualified by pecuniary interest, but the Supreme Court of Wyoming held that the contention was without reason as every Judge must necessarily determine for himself in the first instance the territorial extent of his jurisdiction. See also *Ex Parte Lewis*, 288 Pac. 354 (Okla. Crim. App. 1930).

Indeed the factual basis of the contention is fanciful. Thus any fiduciary is disqualified to act while serving an interest adverse to the interests of his *cestui*. Yet courts of chancery universally recognize that a fiduciary is entitled to compensation measured by the extent of the services rendered. But if the doctrine of adverse interest were pushed to the fanciful extremes urged here, such fiduciaries would in all cases be disqualified to act because they necessarily have to determine the extent of the services required in furthering the interests of their beneficiary; and the result would be that we could have no qualified fiduciaries. Again, any lawyer would be subject to disbarment who would represent a client while simultaneously serving an interest adverse to his client; but it is universally recognized that a lawyer is also entitled to compensation measured by the extent of the services rendered. How-

ever, under the theory advanced by the appellants a lawyer would continually be serving an adverse interest by reason of the necessity of determining the extent of his services required to protect the interests of his client. Obviously this sort of situation is a far cry from the disqualifying interest condemned in the *Tumey* case. When these appellants vainly sought release on *habeas corpus* from the Federal Court, Honorable Benson W. Hough, District Judge, refused even to hear argument on this contention.

Nor can it be said that the notary was in the exclusive employment of the plaintiff, or that he was the creature of the plaintiff. He is an official of the State appointed for the express purpose of presiding at the taking of depositions and under the duty of conducting the proceedings impartially and according to law. Appellants' attempted analogy to *In re Sims*, 54 Kan. 1, 37 Pac. 135, and *In re Ziebold*, 23 Fed. 791, which were cases in which the public prosecutor was vested with the power to pass upon the propriety and compel the production of whatever evidence he desired, is predicated on the manifestly false premise that the notary was by law obliged to grant each request of the interrogating party, irrespective of its lawfulness or unlawfulness. We have already demonstrated that this proposition is diametrically opposed to the plain wording of Section 11510 and to the duties of the notary as expressed by the decisions of the Ohio Supreme Court (Sec. II, B, 1, pp. 22-39, *supra.*) The high esteem in which the office of notary public is held by the Ohio courts is evidenced by the statement of Judge Stephenson in the opinion below:

> "* * * As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers should not be under any obligation to the electorate of

> his county. A notary public is appointed by the governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to perform the duties of the office, or ascertain same by an examination prescribed by the rules of court."

Moreover, the impartiality of his rulings is safeguarded by *Ohio General Code*, Section 11532:

> "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

and Section 131:

> "A notary public who charges or receives for an act or service done or rendered by him a fee or reward greater than the amount prescribed by law, or who dishonestly or unfaithfully discharges any of his duties as notary public, shall be removed from his office by the court of common pleas of the county in which he resides, upon complaint filed and substantiated in such court, and the court shall thereupon certify such removal to the governor. The person so removed shall be ineligible for reappointment to the office of notary public."

It thus can no more be claimed that the notary is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of *habeas corpus* or a motion for a restraining order is in the employ of the applicant therefor. The appellants, through their counsel, ordered copies of the transcription and thus the "employment," if any, was mutual. (Bevan, 115; Koehrman, 93; Stranahan, 90.)

2.

Assuming, as was not the fact, that the Notary was disqualified by pecuniary interest, failure of appellants to make timely objection on the ground of the supposed disqualification constituted a waiver.

If it were assumed that a disqualification of the notary as a matter of fact and law existed, it was waived by failure on the part of all of the appellants to make seasonable objections. The contention that the notary was disqualified by interest was first raised by amended applications filed on the day of hearing of the applications in the Court of Appeals of Lucas County. (Bevan, 69; Koehrman, 47; Stranahan, 44.) Their counsel, in writing, expressly waived proof of the official character of the notary. (Bevan, 129; Koehrman, 106; Stranahan, 104.) Koehrman and Stranahan have never been committed. They did not appear, but were represented by counsel at the hearing. Bevan appeared. He knew that the notary was taking the testimony; he knew that the notary would transcribe it. His counsel ordered copies of the transcription. (Bevan, 115.) He knew that under the laws of Ohio it would be the duty of the notary to order him to answer and punish him for contempt if he failed to answer any pertinent question. The notary did order him to answer, but he still made no objection. (Bevan, 115.) If that objection had then been made, another stenographer could have been called to take the testimony. Under these circumstances, he cannot sit idly by and then claim that he is released on the basis of a disqualification, if any, of the officer, of which he at all times knew. *State ex rel. Bowman v. Commissioners,* 124 O. S. 174, 177 N. E. 271; *Tari v. State,* 117 O. S. 481, 159 N. E. 594. The *Tumey decision* is discussed in the foregoing cases and shown to be inapplicable where timely objection has not been made, as is the fact in the instant case.

The dictum in the case *In re Sage*, 24 O. C. C. (N. S.) 7, relied upon by the appellants, does not support their contention that the objection was raised in accordance with the State practice, but were the fact otherwise, such dictum is clearly overruled by the decisions of the Ohio Supreme Court in the case of *State ex rel. Bowman v. Commissioners, supra,* and *Tari v. State, supra.*

3.

Assuming the objection of disqualification existed in fact and has not been waived, the subsequent hearing on the merits by a disinterested Court under Section 11514 has cured any such supposed defect and satisfied every requirement of due process of law.

We have already seen that Section 11514 provides for a full, free and untrammeled review and examination of the *legality* of the commitment or attachment without prejudice by reason of any action, finding or conclusion of the committing magistrate. (See pp. 7 and 8, *supra.*) The statute provides for a full, free examination by an unprejudiced and qualified court. In *Tumey v. State,* 273 U. S. 510, the defendant had no opportunity for a fair trial on the merits either in the court of original jurisdiction or in any reviewing court. The judgment of the disqualified magistrate could not be set aside so long as there was any evidence to support it. *Tumey v. State, supra,* page 533. Here the witnesses were entitled to apply to any court of record of the State for a determination of the *legality* of the action holding them respectively to answer the questions and testify in the cause. This review was free and untrammeled. It was not prejudiced, restricted, limited or affected by any action, finding or conclusion theretofore made by the supposedly disqualified officer. It was a full, free review by a competent, unprejudiced and qualified court. Under these

circumstances, it is clear that there is no denial of due process of law. In *Ex parte Meeks*, 20 Fed. (2d) 543, (District Court, Kentucky, 1927) the syllabus reads:

> "Question involved in habeas corpus proceeding to release a person from confinement under a judgment of a state court convicting him of a crime is whether he has been denied due process of law, under Const. U. S. Amend. 14, by the state, and that is determined, not merely by the result in one state judicial tribunal, but by the whole procedure open to him under the state law, and whether state law furnishes means by which the wrong done in one tribunal may be corrected in another.
>
> That under Kentucky law county judge, who tried case in which petitioner was convicted of illegal transportation of intoxicating liquor, in violation of state prohibition enforcement act, was entitled to 10 per cent. of fine imposed, *held* not to entitle petitioner to habeas corpus writ out of federal court, on the ground that trial judge's pecuniary interest denied petitioner the equal protection of law and due process of law, guaranteed by Const. U. S. Amend. 14, where he failed to avail himself of right under Cr. Code Prac. Ky., §§ 362, 366, to appeal to state circuit court, in which trial *de novo* would have been had, with further right of appeal to Court of Appeals, and possible application for writ of prohibition under section 25."

The *Tumey* case is distinguished on the same ground in the following cases, all holding that a subsequent trial on the merits by a disinterested court cures the defect and grants to the defendant "due process of law." *Hitt v. State*, 149 Miss. 718, 115 So. 879; *Hill v. State*, 174 Ark. 886, 298 S. W. 321; *Ex Parte Lewis*, 288 Pac. 354 (Okla. Crim. App. 1930), and *Brooks v. Town of Potomac*, 149 Va. 427, 141 S. E. 249. See also *Frank v. Mangum*, 237 U. S. 309, 327, 331.

C.

The Contention that the Duces Tecum Clauses of the Subpoenas Served on Bevan and Koehrman Constitute Unreasonable Searches and Seizures, Presents No Federal Question, But, Were the Law Otherwise, It Is Manifest Both that Such Duces Tecum Clauses Were Valid and that Invalidity of Such Duces Tecum Clauses, Either in Whole or in Part, Would Constitute No Excuse for the Disobedience of Said Appellants.

We are at a loss to understand the reasoning underlying the appellants' argument that a Federal question under the Fourteenth Amendment can be raised by the assertion that a subpoena *duces tecum* served in a proceeding in the State Court is unreasonable and too broad and sweeping in its scope. If they contend that the subpoenas served upon Bevan and Koehrman constituted unreasonable searches and seizures and that the privileges and immunities granted by the Fourteenth Amendment include protection against unreasonable searches and seizures, their argument is clearly untenable in the face of the prior decisions of this Court. The personal rights, privileges and immunities set forth in the first eight amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78. And therefore an unreasonable search and seizure may be made by a state officer under state authority without violating the Federal Constitution in this respect. *Weeks v. United States*, 232 U. S. 383, 398.

If, on the other hand, the appellants contend that the due process clause of the Fourteenth Amendment, without reference to the first eight amendments, protects against unreasonable subpoenas *duces tecum*, their argument is

likewise untenable. There is nothing in the Fourteenth Amendment which prohibits a State from compelling the production of documentary evidence, no matter how broad in scope or how unreasonable such compulsion may be as a matter of fact. The most that due process of law could require would be that the compulsion be according to legal procedure with due notice and an opportunity for hearing. Thus it is stated in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 at 551:

> "So long as a hearing is given before any proceeding is concluded to enforce production of the papers, due process of law is afforded."

The complaint of the appellants on this score must therefore be limited to the identical claims raised in connection with the subpoenas and orders directing them to appear and testify, which claims we have already fully discussed and shown to be without merit (*supra*, pp. 14-20, 50-53). The further suggestion that this Court should examine the subpoenas *duces tecum* and pass upon the reasonableness of their scope or the materiality of the evidence demanded is as unsound as a claim that this Court should pass upon the relevancy of the questions asked the witness, Bevan, or any other questions of purely state law.

However, if it be assumed for the sake of argument that the reasonableness or unreasonableness of the subpoenas *duces tecum* presents a Federal question under the Fourteenth Amendment, it is manifest that the subpoenas are regular in every respect and are not too broad or sweeping. The claim of invalidity cannot be based upon the ground that the records and documents called for are insufficiently described. It is not necessary to designate each particular paper (*Consolidated Rendering Co. v. Vermont, supra*, at 551); but so long as the papers or records are specified with such certainty that the witness may know what documents and papers are wanted, the descrip-

tion is sufficient. *United States v. Babcock,* 3 Dill. 556, Federal Cases No. 14,484. It is also well settled that so long as there is any reasonable ground to believe that the documentary evidence called for by the subpoena may be relevant or material, the subpoena is not open to attack on the ground of unreasonableness. *Hale v. Henkel,* 201 U. S. 43, 73; *Consolidated Rendering Co. v. Vermont,* 207 U. S. 541; *United States v. Terminal Ry. Assn.,* 148 Fed. 486, 489; *Eykelboom v. People,* 71 Colo. 318, 206 Pac. 388, 390; *In re Mohawk Overall Co.,* 210 N. Y. 474, 104 N. E. 925, writ of error dismissed 235 U. S. 685; *In re Consolidated Rendering Co.,* 80 Vt. 55, 66 Atl. 790.

A consideration of the broad scope and ramifications of the fraudulent conspiracy and fraudulent misrepresentations set forth in the petition in the Common Pleas Court establishes that the subpoenas *duces tecum* call for no documents, records or papers which are not relevant or pertinent to the allegations of the petition. It was so held by the Court of Appeals of Lucas County. It was so held by the Supreme Court of Ohio. The same view was expressed by Judge Hough in the hearings in the Federal District Court. (Opinion unreported.) The petition in the Common Pleas Court charges a fraudulent conspiracy initiated at least as early as 1917. It charges the acquisition of the stock of the Sielcken Estate by the individual defendants through widespread, fraudulent misrepresentations and concealments for a grossly inadequate price. It seeks to recover the stock and all cash or stock dividends declared and paid since the fraudulent conversion. (Bevan, 70-88; Koehrman, 48-66.) Obviously proof of these allegations requires evidence of the financial condition and affairs of The Woolson Spice Company. It involves a tracing of the stock fraudulently converted and the cash and stock dividends paid thereon. The petition charges that some of these defendants occupied a position of confidence which

imposed upon them a trust. Without burdening the Court further with details as to the broad, fraudulent conspiracy and widespread fraudulent misrepresentations charged against the defendants, which can only be fully appreciated by an examination of the petition, it is clear that the subpoenas *duces tecum* called for documents relevant and material to the allegations of the petition.

Clearly the documents described in the subpoenas *duces tecum* tend to support the allegations of the petition. In the words of Mr. Justice McKenna in *Nelson v. United States,* 201 U. S. 92, at 114:

> "* * * they are elements in the proof, having tendency enough to sustain the charge to be considered material."

However, an examination of the subpoenas served upon the appellants Koehrman and Bevan, will disclose that they consist of two parts, one a command to appear and give evidence as a witness, and the other a command to produce certain described papers and records. (Bevan, 44-46; Koehrman, 43-44.) It is well settled that the invalidity of a *duces tecum* clause of such a subpoena does not excuse a failure or refusal to comply with the *ad testificandum* clause. *Leber v. United States,* 170 Fed. 881; *Wilson v. United States,* 221 U. S. 361, 373-4; *United States v. Terminal Ry. Ass'n of St. Louis,* 148 Fed. 486, 488-9; 40 *Cyc.* 2169-70. The foregoing cases also establish that if, as respondent believes not to be the fact, any section of the *duces tecum* clauses of the subpoenas is too broad or otherwise invalid, that did not excuse Bevan and Koehrman from complying with the valid portions. The appellant Koehrman refused to appear and either testify under the *ad testificandum* clause, or produce any of the records subpoenaed. The appellant Bevan refused to testify under the *ad testificandum* clause, and refused to produce any of

the records subpoenaed. Hence both were in contempt even if it were assumed that the *duces tecum* clauses of their subpoenas were void in whole or in part. In *Hale v. Henkel, supra,* where the subpoena *duces tecum,* issued under Federal procedure, was found to be so sweeping and indefinite as to constitute an unreasonable search and seizure, the Court nevertheless remanded the petitioner to custody. The last paragraph of the syllabus reads:

> "Although the *subpoena duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt."

Were any section of the *duces tecum* clause invalid or defective on any ground, as is not the fact, the remedy would be to move to quash the invalid sections, or, on appearance to refuse to produce the documents called for by such sections, while testifying generally and producing the papers lawfully required; but a witness can not contemptuously ignore the subpoena in reliance on a blanket or blunderbuss objection such as the one in the cases at bar, without suffering the penalties of contempt.

Crocker-Wheeler Co. v. Bullock, 134 Fed. 241, (cited in Appellants' Brief, p. 61), merely involved the question whether a witness could be required to produce privileged records containing trade secrets which were not relevant, and obviously has no application to the instant cases. There is no claim of privilege here.

Of course none of the claims of the appellants with respect to the subpoena *duces tecum* are available to appellant Stranahan who was served with an ordinary subpoena *ad testificandum.* (Stranahan, 43.)

CONCLUSION.

In the foregoing brief we have examined each of the contentions of the appellants; and we have shown that such contentions, including those which cannot be raised on these appeals, are without merit. With the wisdom or policy of the Ohio statutes this Court is not concerned. However, the question here involved is not "only the right of a party to cross examine his adversary in connection with the assertion of private claims by private persons." (Appellants' Brief, 43.) It is the fundamental question whether the State of Ohio may compel its citizens to give testimony in aid of the administration of civil justice to the end that justice in the State may be certain and secure. The right to cross examine an adversary under Section 11497 is merely incidental to the more fundamental right to take testimony by deposition in civil causes and applies equally to the taking of testimony in open court. One purpose of the scheme for taking testimony by deposition in Ohio is to guard against and prevent the miscarriage of justice through loss of material or essential evidence. The deposition cannot be used if the witness is available at the time of trial. Section 11525. Another purpose of the Ohio deposition statutes, which applies with peculiar force in these cases, is to provide a means whereby one, who is alleged to have wronged another and who has primary knowledge or controls primary evidence of the alleged wrong, may be compelled to disclose the truth to the end that complete, certain and even justice may be determined and administered. It is designed to prevent surprises, delays and miscarriages of justice.

The petition in the Common Pleas Court discloses a grievous wrong and charges a shocking fraud. It exhibits a far flung fraudulent conspiracy conceived, initiated and carried out by persons who had wrongfully gained control of the defendant corporation, who occupied and betrayed

a relation of the highest trust and confidence and who took advantage of the enforced absence of the rightful owner in a foreign land where he was, to the knowledge of the conspirators, being held by a fatal illness and as a United States citizen interned by the German Empire for the duration of the World War. The alleged instigators and participators in this fraud, who took advantage of the foregoing exigencies to work out and consummate their fraud in security and leisure during the enforced absence of Sielcken and, after his death, of his widow, include the appellants Stranahan and Koehrman and The Woolson Spice Company, of which the appellant Bevan is Secretary and Treasurer. Much of the material proof lies in the mouths and under the control of these defendants and appellants. Manifestly it is important to the administration of justice both that all competent evidence of the truth shall be disclosed and that such evidence shall not be lost by death or otherwise. The State of Ohio has deemed it essential to the effective and certain administration of justice that adequate provision should be made for the compulsion and preservation of such testimony. The appellants have sought and now seek to prevent the disclosure and the preservation of the truth by every technicality known to the law. The real question is merely whether these appellants shall be required to appear as witnesses and to tell the truth to the end that the truth may be established and preserved to make certain the administration of civil justice. As said by the late Mr. Chief Justice Taft, when Judge of a State Court in Ohio (*Shaw v. Ohio Edison Co.*, 9 Ohio Dec. Reprint 809, 812):

> "What a witness is presumed to know is the truth and that cannot vary between the time of taking the deposition and the trial. If there is likely to be a variance in the testimony, the earlier a witness is committed to a statement, the better for the sake of the truth."

Appellee respectfully submits that each of these appeals should be dismissed for lack of any substantial Federal question or that the judgments of the Supreme Court of Ohio in these cases should be severally affirmed.

Respectfully submitted,

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APPENDIX A.

Sections of the General Code of Ohio Involved, Cited or Discussed.

SEC. 127. *Fees of notaries public.*—A notary public shall be entitled to the following fees:

* * * * *

For taking and certifying acknowledgments of deeds, mortgages, liens, powers of attorney and other instruments of writing, and for taking and certifying depositions and affidavits, administering oaths and other official services, the same fees as are allowed by law to justices of the peace for like services. (R. S. §119.)

SEC. 1746-2. *Fees of justices for miscellaneous services.* For miscellaneous services, justices of the peace shall charge and collect from the persons for whom the services are rendered the following fees, and no more: * * * taking depositions and certifying to same, twenty-five cents per hundred words; * * *. (Eff. August 16, 1921.)

SEC. 2253. *Expenses of judges holding court outside county of residence.* In addition to the annual salary and expenses provided for in §§1529, 2251, 2252, 2252-1, each judge of the court of common pleas while holding court in a county in which he does not reside, by assignment of the chief justice under G. C. §1687, or without any assignment, shall receive his actual and necessary expenses incurred while so holding court in a county in which he does not reside, to be paid from the treasury of such county upon the warrant of the county auditor, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of G. C. §1469, to aid in disposing of business of some county other than that in which he resides, shall receive twenty dollars per day for each day of such assignment and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county. (Eff. Aug. 10, 1927.)

SEC. 2253-3. *Expenses of judges (of the) court of appeals holding court outside county of residence; pay when assigned to outside district.* In addition to the annual salary and expenses provided for in §§1529, 2251 and 2253-2, each judge of the court of appeals holding court in

a county in which he does not reside shall receive his actual and necessary expenses incurred while so holding court in a county in which he does not reside, to be paid by the state treasurer upon the warrant of the auditor of state issued to such judge; each judge of the court of appeals who is assigned by the chief justice by virtue of G. C. §1528, to aid in disposing of business of some district other than that in which he is elected or appointed, shall receive twenty dollars per day for each day of such assignment, to be paid from the treasury of the county to which he is so assigned and upon the warrant of the auditor of such county. (Eff. Aug. 10, 1927.)

SEC. 11497. *Corporations; officers may be examined.* At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony. (R. S. Sec. 5243.)

SEC. 11502. *Subpoena on taking depositions.* When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer. (R. S. Sec. 5248.)

SEC. 11503. *What subpoena to contain.* A subpoena shall be directed to a person named therein and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence. (R. S. Sec. 5247.)

SEC. 11504. *Service of subpoena.* A subpoena may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed. (R. S. Sec. 5246.)

SEC. 11510. *Contempt of court.* Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a

witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. (R. S. Sec. 5252.)

SEC. 11511. *When attachment may issue.* When a witness fails to obey a subpoena personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him. (R. S. Sec. 5253.)

SEC. 11512. *Punishment for contempt.* Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition. (R. S. Sec. 5254.)

SEC. 11514. *How witness released from imprisonment.* A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal. (R. S. Sec. 5255.)

SEC. 11521. *How testimony taken.* The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination. (R. S. Sec. 5261.)

SEC. 11525. *When deposition may be used.* The deposition of a witness may be used only when it is made to ap-

pear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required. (R. S. Secs. 5265, 5281.)

SEC. 11526. *What deposition taken.* Either party may commence taking testimony by deposition at any time after service upon the defendant. (R. S. Sec. 5266.)

SEC. 11529. *Officers authorized to take depositions.* Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission. (R. S. Sec. 5269.)

SEC. 11534. *Notice to take deposition.* Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice specified that his deposition would be taken. (R. S. Sec. 5273.)

SEC. 11535. *Service of Notice.* Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day. (R. S. Sec. 5273.)

SEC. 11537. *By whom deposition written.* The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness. (R. S. Sec. 5275.)

SEC. 12165. *When writ not allowed.* If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed*; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order. (R. S. Sec. 5729.) (Italics ours.)